LAW AND THE STRUCTURE OF AUTHORITARIAN RULE: KNOWLEDGE, SOVEREIGNTY, AND JUDICIAL POWER IN SUDAN, 1898-1985

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DEDICATION

To my parents, Jane and Richard.

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ABSTRACT

How does a strong and independent judiciary emerge in a colonial or authoritarian state? What is the relationship between law and political power when the state is weak or legal authority is fragmented? This dissertation, which covers a period of Sudanese history stretching from colonization in 1898 to the collapse of the Numayri regime in 1985, argues that judicial strength and independence emerged as a direct result of regime policy, which sought to deploy the judiciary as a means of maintaining security, reducing bureaucratic inefficiency, and managing political activism. In this context, the fragmented and pluralist nature of Sudan's legal system is actually part of what has made state power possible, as it allowed successive regimes to play various judicial institutions off of one another, strengthening some and undermining others depending on the nature of the threats they faced. Drawing on extensive archival research and a careful analysis of political and religious discourse, this dissertation explores the role of civil, customary, religious, and bureaucratic courts in facilitating authoritarian rule in twentieth-century Sudan. In addition, it also analyzes the relationship between legal knowledge, codification, and state power in one of the world's most fragile countries. As such, it makes an important contribution to the literature on authoritarianism, judicial politics, and state formation in Africa and the Middle East.

ABRÉGÉ

Comment un système judiciaire fort et indépendant peut-il émerger dans un État colonial ou autoritaire? Quelle est la relation entre le droit et le pouvoir politique lorsque l'État est faible ou l'autorité juridique est fragmentée? Cette dissertation, qui couvre l'histoire soudanaise de la colonisation en1898 à l'effondrement du régime de Numayri en 1985, soutient que le pouvoir et l'indépendance du système judiciaire au Soudan se sont développés en raison de la politique du régime. L'objectif de cette politique était d'utiliser le système judiciaire pour maintenir la sécurité, réduire l'inefficacité bureaucratique et contrôler l'activisme politique. Dans ce contexte, la nature fragmentée et pluraliste du système juridique

soudanais a contribué à rendre le pouvoir d'État possible, car elle a permis aux régimes successifs de jouer les institutions judiciaires les unes contre les autres. Cette stratégie a renforcé certaines institutions judiciaires et en a miné d'autres, tout dépendant des difficultées auxquelles elles faisaient face. Grâce à une recherche approfondie de documents d'archive ainsi qu'une analyse de discours politique et religieux détaillée, cette thèse explore le rôle qu'ont joué les tribunaux civils, coutumiers, religieux et administratifs dans l'établissement d'un régime autoritaire au Soudan au XXe siècle. De plus, elle analyse la relation entre la connaissance juridique, la codification et le pouvoir étatique dans l'un des pays les plus fragiles du monde. En tant que tel, la thèse apporte une contribution importante à la littérature sur l'autoritarisme, la politique judiciaire, et la formation de l'État en Afrique et au Moyen-Orient.

CHAPTER ONE: INTRODUCTION

Introduction

Why does a strong and independent judiciary emerge in the context of a weak, authoritarian state? And how can a weak regime prevent such a judiciary from undermining its authority? Using the example of twentieth-century Sudan as a case study, this dissertation explores the nature of regime-judiciary relations in the modern African state. It argues that Sudan's regimes, both civilian and military, have deployed judicial institutions in order to manage dissent, overcome bureaucratic inefficiency, and respond to the unpredictable nature of political life. For such a judiciary to be effective in this task, however, it must possess some measure of institutional authority and autonomy. Sudan's regimes, therefore, are faced with the challenge of *empowering* their judiciary while at the same time ensuring its *compliance*. Much of the last century of judicial reform in Sudan can be understood as an attempt to reconcile these twin objectives. Depending on regime type, constituency, institutional capacity, and ideological conviction, Sudan's regimes have sought to meet this challenge in different ways. The purpose of this dissertation is to analyze those strategies, and to show how they are reflected in the institutions and ideologies of the Sudanese state.

At its most general level, this dissertation analyzes the role of law and the judiciary when state institutions are weak – and according to most conventional definitions, Sudan's institutions are very weak indeed. Up until 2005, Sudan was the site of one of Africa's bloodiest and longest lasting civil wars, a conflict that ultimately ended with the secession of its southern third in 2011. Related conflicts continue to rage in the country's western and (new) southern regions, swelling the number of internally displaced peoples to crisis proportions.[1] Nor have Sudan's regimes, of which there have been six since independence in 1956, proven particularly stable. Democratic

[1] According to a 2014 UNDHR report, nearly 2 million Sudanese are either internally displaced or suffer internally displaced-like conditions. A further 150,000 refugees, largely from neighboring Eritrea and Ethiopia, live in informal camps and slums, where they frequently lack even the most basic provisions provided by the state. See "2014 UNDHR country operations profile", http://www.unhcr.org/pages/49e483b76.html (accessed April 7, 2014).

governments were toppled by the military in 1958, 1969, and 1989, only to be replaced by authoritarian regimes that were themselves deeply divided and subject to frequent purges. Meanwhile, few of Sudan's political elites have enjoyed any sustained autonomy from civil society forces, and so lack the ability to easily extract resources, implement complex policies, or carry out effective long-range planning. In such an environment, many of the core functions of the Sudanese state (e.g. education, welfare provisioning, internal security, and resource development) have been devolved to non-state and international actors.[2] It is little wonder, therefore, that Sudan has been ranked so consistently as one of the world's leading "failed" states.[3]

Yet if many of Sudan's state institutions are weak, the judiciary has historically not been one of them. On the contrary, it has frequently been one of the strongest. During the first decades of the twentieth century, for example, Sudan's Anglo-Egyptian colonial regime vested enormous political and economic authority in the so-called "tribal" judiciary, a vast network of courts that was largely unaccountable to government officials. Beginning in the 1930s, many of these powers began to migrate to the civil judiciary, which by the 1950s was a key broker between rival political parties, often shouldering responsibilities that the executive and legislative branches were too weak to carry out on their own. And when the civil and Islamic judiciaries were finally unified in 1980, Sudan's judges emerged as some of the most powerful political figures in the country, capable of influencing events far beyond their formal jurisdiction. Throughout,

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[2] The literature on this aspect of Sudanese politics is extensive. See Abusharaf, R. M. (2009). *Transforming Displaced Women in Sudan*. Chicago: University of Chicago Press; Bernal, V. (1997). "Colonial Moral Economy and the Discipline of Development: The Gezira Scheme and 'Modern' Sudan." *Cultural Anthropology* 12(4): 447-479; Berridge, W. (2012). "Sudan's Security Agencies: Fragmentation, Visibility and Mimicry, 1908-89." *Intelligence and National Security* 28(6): 845-867; Hutchinson, S. E. (1996). *Nuer Dilemmas: Coping with Money, War, and the State*. Berkeley: University of California Press; de Waal, A. (2005). "Who are the Darfurians? Arab and African Identities, Violence and External Engagement." *African Affairs* 104(415): 181-205.

[3] Of 177 countries surveyed, Sudan has ranked in the top three most failed states for each year between 2005 and 2013, according to the Fund for Peace's *Failed States Index*. See "Failed States Index: Sudan", http://ffp.statesindex.org/sudan (accessed April 4, 2014). As we shall see, however, this framing of states in terms of "success" and "failure", or "strong" and "weak", is problematic and potentially misleading.

the judiciary was a central component of the Sudanese regime's "toolbox", effective for everything from repression and improving state efficiency to legitimizing the *status quo*.

This dissertation takes as its subject the institutional and ideological relationship between the Sudanese regime and its judiciary. Surveying a period from 1898 to 1985, it charts the development of regime-judiciary relations during the colonial and post-colonial eras, encompassing regimes both secular and religious, authoritarian and democratic. Its primary approach is historical institutionalist in nature, meaning that it attempts to trace the evolution of judicial institutions over time, as well as their changing relationship with the Sudanese regime. However, it also carries out a close textual analysis of official regime and judiciary discourse. One of the central arguments of this dissertation is that the legal and political theories held by the regime (e.g. the purpose of the law, the value of judicial independence, the nature of legal sovereignty) had a profound influence on the regime-judiciary relationship. As a result, official discourse cannot be dismissed as epiphenomenal to regime behavior.

That focus on ideology distinguishes this dissertation from other historical institutionalist scholarship on Sudan, including the excellent recent work of Mark Fathi Massoud. In his book *Law's Fragile State*, Massoud argues that the force of popular legal ideologies is a principal reason why human rights-based approaches to legal development failed to gain adherents in Sudan, where religious and communitarian values are so important.[4] Having acknowledged the role of ideology among civil society, however, Massoud refrains from extending this insight to the regime itself. Instead, the regime is presented as distinctly *non*-ideological, and its behavior explained purely in terms of rational self-interest and power maximization. This type of analysis is ill equipped to make sense of seemingly contradictory regime policies, including the colonial government's empowerment of so-called "native courts" in the 1920s or the adoption of Islamic law by the Numayri regime in the 1980s, which will be discussed in Chapter Two and Chapter Five of this dissertation, respectively. By attending to the ideational context in which regime strategies are forged, we can gain a much fuller understanding of why judicial power in Sudan has emerged in the form that it has.

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[4] Massoud, M. F. (2013). *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge: Cambridge University Press, 185-191.

At the same time, one of the key arguments of this dissertation is that the Sudanese judiciary is a profoundly heterogeneous and multi-vocal set of institutions. As a result, it makes little sense to speak of a single regime-judiciary relationship or ideology, but rather multiple relationships and multiple ideologies. Part of what makes the Sudanese case such a fascinating one, therefore, is that it illustrates the impact of legal pluralism in a way that studies of stronger states cannot. While the weakness of state institutions was obviously a challenge for Sudan's regimes, it also opened up new avenues for creative regime problem solving that would have been closed to regimes in stronger states like Egypt or Chile.[5] Therefore, not only does this dissertation shed light on one of the least understood of Sudan's state institutions, but it also makes an important contribution to the literature on authoritarianism and legal reform in what are often called "weak" African states.

In light of these findings, it may also make sense to re-evaluate what we mean by state "weakness" or "failure". Though I have adopted this language in my dissertation, I do so with some reservation. In recent decades, a great deal of literature – much of it centered on African cases – has called into question the teleological and Western-centric assumptions of the state failure literature, rightly condemning it for positing the universality of the classic Weberian state model.[6] At the same time, many critics of that model have continued to view legal pluralism and judicial fragmentation (two key features of the Sudanese legal system, as we shall see) as a consequence of the state's retreat, even if they are decidedly more optimistic about the non-state social arrangements and institutions that emerge in its place.[7] But as this dissertation will argue,

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[5] Hilbink, L. (2007). *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge: Cambridge University Press; Moustafa, T. (2007). *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge: Cambridge University Press.

[6] Chabal, P. and J. Daloz. (1999). *Africa Works: Disorder as Political Instrument.* Oxford: James Currey; Ferguson, J. (2006). *Global Shadows: Africa in the Neoliberal World Order.* Durham: Duke University Press; Herbst, J. (1990). "War and the State in Africa." *International Security* 14(4): 117-139; Pitcher, A., et. al. (2009). "Rethinking Patrimonialism and Neo-Patrimonialism in Africa." *African Studies Review* 52(1): 124-156.

[7] Menkhaus, K. (2007). "Governance without Governance in Somalia: Spoilers, State Building, and the Politics of Coping." *International Security* 31(3): 74-106; Santos, B. de S. (2006). "The Heterogeneous State and Legal Pluralism in Mozambique." *Law & Society Review* 40(1): 39-75.

particularly in Section Three of this Introduction and then throughout the subsequent chapters, legal pluralism and judicial fragmentation can actually help to strengthen states, and indeed may be a direct and intended consequence of regime policy.

The remainder of this Introduction is divided into five sections. First, I develop in greater detail the central questions and theses of this dissertation, as well as explain their significance for the study of judicial politics in weak authoritarian states. In the second section, I survey the existing research on judicial institutions under authoritarian regimes, focusing in particular on two key critiques of the so-called "Rule by Law" literature that the Sudanese case is well positioned to address. The third section turns to the work of post-colonial theorists and scholars of Islamic law. Rejecting the association of state sovereignty with legal standardization, this section argues that states can and do rule through the strategic deployment of legal ambiguity. Section Four surveys recent scholarship on law in Sudan and justifies the country as a case study. Finally, in the fifth section I outline the structure of this dissertation and describe its major methods and sources.

I. The Problem of Judicial Power

As its point of departure, this dissertation begins with two important questions: (1) how does a strong and independent judiciary arise in the context of a weak, authoritarian state; and (2) how does a weak regime prevent such a judiciary from undermining its authority?

Together, these questions point to a central tension within judicial politics under non-democratic regimes, one famously articulated by the Marxist historian E.P. Thompson in his study of the early modern English legal system: On the one hand, the legal regime established by the English crown was clearly meant to privilege the property rights of the nobility over those of commoners. On the other hand, a court system that ruled consistently in favor of the nobles would be immediately recognized by commoners as a transparent tool of the ruling class – and in which case, why bother having a legal system at all? Why not simply resort to naked force? "If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's

hegemony."[8] For the courts to serve their purpose as tools of regime interests, therefore, they cannot simply follow the dictates of an authoritarian regime. On the contrary, they must possess some minimal degree of independence and discretionary power, even to the point of ruling against the interests of the regime itself. "The essential precondition for the effectiveness of the law, in its function as an ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just."[9]

Thompson's argument suggests that a genuinely independent judiciary may be necessary to properly legitimize a regime. To this ideologically-centered argument, we can add a material one as well: a strong and independent judiciary will be better prepared to respond to new challenges to state sovereignty. Even where the courts fail to impart a veneer of legitimacy to the state, they may still play an essential role in the regime's coercive apparatus, able to surveil the population, monitor disputes, and direct the efficient use of force.[10] According to Nathan Brown, for example, the primary function of the Egyptian judiciary is not to convince the population of the state's legitimacy, but rather to sustain the "officially sanctioned order" by building "a stronger, more effective, more centralized, and more intrusive state."[11] This role, however, requires that the regime grant the judiciary a certain measure of power and independence, particularly in an environment of political instability, where threats to the officially sanctioned order can take new and unexpected forms.

However, the Sudanese state is not merely authoritarian; it is also weak. This distinguishes it from other authoritarian states with strong judiciaries, such as Egypt, Russia, or Chile. Most of the literature on authoritarian judiciaries confines its analysis to relatively stable or strong states. As a result, we know relatively little about how powerful and independent judiciaries emerge in authoritarian states that are also weak –

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[8] Thompson, E. P. (1975). *Whigs and Hunters: The Origin of the Black Act*. New York: Pantheon Books, 262.
[9] Ibid 263.
[10] Shapiro, M. (1981). *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press.
[11] Brown, N. (1997). *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*. Cambridge: Cambridge University Press, 237.

an oversight that a close analysis of the Sudanese case is equipped to address. Following Joel Migdal, I define a weak state as one that lacks the capability to successfully "*penetrate* society, *regulate* social relationships, *extract* resources, and *appropriate* or use resources in determined ways."[12] This condition is often, though not always, due to the absence of state autonomy from strong civil society forces, which in many developing countries were the direct beneficiaries of colonial rule. The weakness of Sudan's state adds an extra dimension to regime-judiciary relations, and raises a number of issues that judiciaries in more powerful authoritarian states do not. A key problematic associated with the concept of weak states is that much of the literature assumes them to have enormous difficulty producing strong institutions, so how did a strong judiciary emerge in Sudan? And how have Sudan's regimes, themselves often hobbled by weak institutions and a lack of autonomy from social actors, sought to control the judiciary, or at least guide its behavior?

My central contention is that the empowerment of Sudan's judicial institutions was part of a deliberate strategy by successive regimes, working in conjunction with many civil society actors, to maintain public security, reduce bureaucratic inefficiencies, and manage political activism. But I also argue that a vital component of this strategy involved responding to the threat posed by judicial power to the regime itself. On the one hand, by endowing judicial personnel with a range of powers and immunities, as well as a measure of personal discretion in their deployment, Sudan's rulers hoped to create an institutional framework capable of responding quickly and creatively to any threat to their rule. On the other hand, such an empowered, autonomous judiciary was itself a potential threat to the regime. For that reason, both colonial and post-colonial governments in Sudan sought to set clear limits on judicial power and independence, without also sacrificing the speed and innovation that made the judiciary so useful in the first place.

To accomplish this, Sudan's regimes adopted a two-fold strategy consisting of both institutional arrangements and powerful forms of official discourse. First, they sought to cultivate in certain elements of the judiciary an ideology of apoliticism and deference to the executive branch. This was accomplished through the careful screening

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[12] Migdal, J. (1988). *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World*. Princeton: Princeton University Press, 4-5.

of potential recruits, strict professional education, and on-site training and discipline. Second, Sudan's regimes adopted a "segmented" approach toward judicial empowerment, whereby certain judicial institutions and actors were given wide discretion while others were closely monitored and constrained. This strategy, which was only possible due to the extreme pluralism of the Sudanese legal system, allowed the regime to play its judicial institutions off one another. It is important to note, moreover, that regime ideology played a crucial role in determining which judicial institutions would be empowered and which would not. Of particular importance were concepts of *natural* versus *artificial* order. Depending on whether or not a judge was thought to be governed by a natural order (e.g. tribal discipline, human nature), the regime would be more or less likely to entrust him with wide ranging powers and autonomy.

In addition to exploring the historical and political factors underpinning judicial strength in the context of a weak and authoritarian state, a key theoretical objective of this dissertation is to determine the limits of legal knowledge as a source of regime power in Sudan. The equivalence of knowledge and power is so fundamental to the literature on post-colonial politics that it is rarely questioned.[13] Yet it is also the case that knowledge about the law necessarily attributes to it a certain sense of predictability and stability. Might this itself be an impediment to power? To take an obvious example, a law code represents the textualization of legal practice. In its ideal form, it serves as a source book

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[13] This is especially true of post-colonial scholars indebted to Michel Foucault, as most of those working in the field are. In his fullest treatment of this question, Foucault argues that knowledge and power are inseparable aspects of the same social process. Through acts of observation, measurement, and training, individuals are made to behave in a certain way. This process of "discipline" both generates a body of knowledge about that individual and her environment, and is itself an expression of that knowledge. The object of knowledge is itself constituted through the process of its study. Post-colonial theorists have found Foucault's ideas to be a useful analytical tool for understanding the imposition of Western law (particularly positive law) on colonial societies. As a result, it has become quite common to assume that colonial regimes were intensely interested in using the law to render populations knowable, and therefore governable. As will be argued in Section Three of this chapter, this assumption may not always be warranted. See Foucault, M. (1995). *Discipline and Punish: The Birth of the Prison*. New York: Vintage. For examples of these ideas applied to a colonial and post-colonial setting, see Cohn, B. S. (1996). *Colonialism and Its Forms of Knowledge: The British in India*. Princeton: Princeton University Press; El Shakry, O. (2007). *The Great Social Laboratory: Subjects of Knowledge in Colonial and Postcolonial Egypt*. Stanford: Stanford University Press; Mitchell, T. (1988). *Colonizing Egypt*. Cambridge: Cambridge University Press.

for the proper behavior of subjects and the corresponding response of judicial authorities in the event of their transgression. As a means for knowledge about the law, the law code is invaluable. And yet, it is a knowledge derived in part through the setting of limits, the inhibiting of change, the foreclosing of certain possibilities and futures. Through the codification of the law, an authoritarian state may have a clearer understanding of how its subjects will behave, and thus gain a valuable tool for social control. However, codification also sacrifices judicial flexibility and creativity, which are key pre-requisites for managing deeply pluralistic and heterogeneous civil societies. Whatever the state gains in the way of *predictive* power comes at the price of the judiciary's *generative* power.[14] And this can be a very high price indeed, particularly in the context of a weak state confronted with many new and surprising challenges to its rule.

On the one hand, this emphasis on flexibility and creativity may strike us as nothing more than good old-fashioned judicial discretion, one of the law's most obvious and *obviously necessary* attributes.[15] And yet judicial discretion poses a very grave challenge to a weak, authoritarian state, where too much independence in the courtroom can represent a potent threat to regime hegemony, and too little can leave it unprepared to fight tomorrow's opponents. As we shall see, Sudan's rulers were well aware of this problem, and indeed, much of the country's twentieth-century legal reform was driven by their desire to solve it. Their solution, at least in part, was to recognize that more information *about* a legal system does not always translate to more control *over* that legal system. Put another way, knowledge has its limits.

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[14] The "generative" power of law lies in its ability to creatively intervene in political debates, often at moments and through methods that the law's authors do not foresee. Thus, unlike many forms of legal positivism and natural law theory, a generative approach to the law finds value in overlapping jurisdictions, legislative obscurantism, and political ambiguity, since it is from these spaces that legal innovation becomes possible. On the generative power of law and its importance in pluralistic societies, see Berman, P. S. (2010). "Towards a Jurisprudence of Hybridity." *Utah Law Review* 1: 11-29; Cover, R. M. (1983). "The Supreme Court, 1982 Term - Foreward: *Nomos* and Narrative." *Harvard Law Review* 97(4): 4-68.

[15] Judicial discretion, as HLA Hart put it, is a necessary response to the "open texture" of the law. Whether through our ignorance of the present, the indeterminacy of the future, or the failure of language to adequately describe either, there must be a place in our legal system for judicial discretion. Hart, H.L.A. (1997). *The Concept of Law*. Oxford: Oxford University Press, 124-136.

One of the key arguments of this dissertation, therefore, is that under certain circumstances, Sudan's regimes have actually *discouraged* their judiciary from behaving in a predictable, measurable fashion. This suggests that when a state is weak, attempting to assert full regime control over judicial institutions may not make sense. A more ambiguous, informal relationship between regime and judiciary may be preferable, especially when the alternative is a judicial apparatus incapable of responding to new and unforeseen threats to its rule.

II. Law and Authoritarianism

One of the main themes of this dissertation has to do with the reasons for and strategies of judicial empowerment in an authoritarian state. In recent years, a growing body of scholarship has reached some interesting conclusions on this issue. Sometimes called the "Rule by Law" literature, its central contention is that authoritarian rulers, who might otherwise be expected to concentrate as much power as possible in the hands of the executive branch, may nonetheless have a rational reason to empower their judiciaries. These regimes, according to Ginsburg and Moustafa, suffer from certain "pathologies" associated with their institutional configuration, including problems of elite cohesion and coordination, economic weakness, lack of legitimacy, and loss of social control.[16] By reorganizing and empowering the judiciary, they may be better able to overcome these pathologies and achieve their objectives.

For example, a regime that has empowered its judiciary may be more successful in offering credible economic commitments to foreign investors (e.g. to respect property rights and enforce contracts), thus facilitating trade and capital investment.[17] Similarly, a weak authoritarian regime may empower its judiciary as a way of hedging against the possibility of its own overthrow. This explanation, sometimes called the "insurance model" of judicial empowerment and independence, argues that by establishing independent judicial power now, the regime will be less likely to suffer extra-legal

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[16] Ginsburg, T. and T. Moustafa, Eds. (2008). *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press, 1-22.
[17] Moustafa 2007; Weingast, B. (1993). "Constitutions as Governance Structures: The Political Foundations of Secure Markets." *Journal of Institutional and Theoretical Economics* 149(1): 286-311.

oppression from whatever government replaces it.[18] Other examples of such benefits from judicial empowerment can be found throughout the literature.[19] What these studies share is a conception of the judiciary as fundamentally constraining. That is, they proceed (to greater or lesser extents) from the belief that the judicial institutions they are describing are "locked in" to the political system, and can only be overcome at some cost to the regime. As a result, the courts are able to force the regime to behave in a fashion it would otherwise not – to *not* nationalize a foreign company, to *not* imprison members of the previous government. And in return for submitting to these constraints, the regime reaps some reward, like capital investment, political insurance, or popular legitimacy.

This focus on the pathologies of authoritarianism is a response to the perceived weaknesses of the Law and Development movement, a rival approach that flourished for a time in the 1960s and 1970s. According to its proponents, the establishment of the rule of law (and here we should understand them to mean a body of rules, universally applied within a given jurisdiction, designed to rationalize social conduct) will inevitably lead to economic development and political liberalism.[20] With its obvious debt to Modernization Theory, the Law and Development movement was one of the first casualties of the

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[18] Ginsburg, T. (2003). *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press; Hirschl, R. (2000). "The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions." *Law & Social Inquiry* 25(1): 91-149.

[19] Balasubramaniam, R. R. (2009). "Judicial Politics in Authoritarian Regimes." *University of Toronto Law Journal* 59(3): 405-415; Barros, R. (2002). *Constitutionalism and Dictatorship*. Cambridge: Cambridge University Press; Helmke, G. (2002). "The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship." *The American Political Science Review* 96(2): 291-303; Hilbink 2007; Hirschl, R. (2009). "The Realist Turn in Comparative Constitutional Politics." *Political Research Quarterly* 62(4): 825-833; Popova, M. (2012). *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*. Cambridge: Cambridge University Press; Soloman, P. (1996). *Soviet Criminal Justice under Stalin*. Cambridge: Cambridge University Press; Toharia, J. J. (1975). "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain." *Law & Society Review* 9(3): 475-496.

[20] For a critical survey of this literature, see Merryman, J. H. (1977). "Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement." *American Journal of Comparative Law* 25(3): 457-491; Tamanaha, B. (1995). "Review Article: The Lessons of Law-and-Development Studies." *The American Journal of International Law* 89: 470-486; Trubek, D. M. and M. Galanter. (1974). "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States." *Wisconsin Law Review*(4): 1062-1102.

dependency revolution of the 1970s.[21] Even before then, however, it was clear to many observers that plenty of non-democratic countries had thriving judiciaries. And if there is nothing inherently incompatible between strong judicial institutions and authoritarianism, then there is no necessary link between the rule of law and political liberalization. The Rule by Law literature was designed to address these deficiencies. It acknowledges the possibility of judicial independence and empowerment in authoritarian states, adding the courts to the long list of other supposedly democratic institutions (e.g. elections,[22] legislatures,[23] political parties,[24] etc.) that are typically thought to be irreconcilable with autocracy, but in fact may be important reasons for its durability.

There have been two important criticisms of this literature, one from within the Rule by Law framework and the other from without. The internal critique attacks what it claims is the field's emphasis on the "rational-strategic" motivations for judicial empowerment. That is to say, most scholars assume a primarily *interest-based* model of regime behavior, often to the exclusion of other ways of thinking about collective decision-making in an authoritarian context. As a result, the Rule by Law literature is insufficiently sensitive to the historical and ideational context in which regime interests and strategies are developed. According to Lisa Hilbink, for example, such rational-strategic explanations cannot account for why strong authoritarian regimes in Chile and Spain (i.e. regimes that did not suffer from the aforementioned "pathologies") nevertheless chose to delegate greater authority and discretion to their judges. It is necessary, she writes, to attend to the ways that "shared experiences, beliefs, identities, ideologies, and interpretation of events and sequences of events" might prompt those regimes to empower their judiciaries, as opposed to attempting some other institutional

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[21] Snyder, F. (1980). "Law and Development in the Light of Dependency Theory." *Law & Society Review* 14(3): 723-804.
[22] Lust-Okar, E. (2006). "Elections under Authoritarianism: Preliminary Lessons from Jordan." *Democratization* 13(3): 456-471.
[23] Gandhi, J. and A. Przeworski. (2007). "Authoritarian Institutions and the Survival of Autocrats." *Comparative Political Studies* 40(11): 1279-1301.
[24] Brownlee, J. (2007). *Authoritarianism in an Age of Democratization*. New York: Cambridge University Press.

reform.[25] Similarly, Kim Lane Scheppele has argued that the constitutionalization of judicial power in Hungary cannot be understood without reference to the trauma of communist rule. The empowering of constitutional courts by the Antall government in the 1990s was not a response to the various "pathologies" of its rule, but rather was a way of "demonstrating that, whatever else the new regime is, it is 'not that' previous one, and it governs a (now, finally) normal country'."[26]

This critique is important, but it leaves the basic causal structure of the Rule by Law literature intact. The external critique, on the other hand, is potentially far more devastating. It questions the very idea that political institutions in authoritarian regimes matter at all. Recall that the Rule by Law approach assumes that courts constrain authoritarian regimes – that is, they force rulers to behave in ways that they would normally prefer not to. We are already confronted with having to prove a counter-factual. How, then, can we know that institutions are not epiphenomenal to whatever it is we seek to explain? If only weak regimes (i.e. those suffering from an authoritarian pathology) create an independent and empowered judiciary, then how can we be sure that it is the judiciary that constrains them and not the source of that underlying weakness? After all, the historical record is littered with coups d'état that violated the constitution, election outcomes that were ignored, and court decisions that were contravened. It may well have been the case that if the institution was stronger and the regime weaker, the coup or the stolen election might never have taken place. But then we must acknowledge that it is not the institution that matters, but rather the relative strength or weakness of the regime.[27]

At the heart of this critique is the recognition that institutions are at once the *product* of a society's prevailing political conditions (i.e. they are endogenous) and the *cause* of its political conditions (i.e. they are exogenous). This ambiguity makes understanding their role extremely difficult even in the best of circumstances, something

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[25] Hilbink, L. (2009). "The Constituted Nature of Constituents' Interests: Historical and Ideational Factors in Judicial Empowerment." *Political Research Quarterly* 62(4): 782.
[26] Scheppele, K. L. (2000). "Constitutional Interpretation after Regimes of Horror." *Working Paper*: 3.
[27] This critique and the challenge it poses to comparative institutionalism is explored in depth in Pepinsky, T. B. (2014). "The Institutional Turn in Comparative Authoritarianism." *British Journal of Political Science*. 44(3): 631-653.

authoritarianism rarely supplies.[28] Tamir Moustafa addresses this critique directly in his analysis of the Egyptian Supreme Constitutional Court. Having surveyed the collapse of judicial independence and executive retrenchment under Mubarak, he wonders what Egypt's institutional designers could have possibly done differently. "If the answer is simply 'getting institutions right'…then the promise of institutional reform for developing countries is indeed bright. But if institutional reforms are feasible and sustainable only when they represent a given balance of power between the state and social forces, then the prospects for institutional reform are much less clear."[29] In Egypt, judicial independence was respected right up until the point where it no longer made sense for the regime to do so. Once the balance of power shifted, all of the court's vaunted constraints proved to be illusory in the face of Mubarak's vicious attack. And if that is the case, it is the prevailing balance of power – not the supposed constraints of institutions – that should occupy our attention.

Interestingly, these two critiques of the Rule by Law literature converge at numerous points. According to the internal critique, judicial empowerment cannot be understood outside of its ideational context. What does the regime value? What does it fear? How has the memory of past experiences shaped its tolerance for risk? Would an empowered judiciary *pose* a risk to the regime, or do they share a common vision of the future? Regime strategies do not have a virgin birth – they are born through the marriage of material interests and the historical context in which they are interpreted. The relationship between the regime and its institutions, therefore, is potentially far more dynamic and dialogic than the Rule by Law literature would suggest. Depending on the context, for example, we might find the regime adopting multiple strategies, empowering some judicial institutions while attacking others. In fact, how the regime *recognizes* a judicial institution is itself a product of ideational context – one that distinguishes the law

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[28] As Adam Przeworski put it, "Imagine if only those institutions that generate some specific outcomes, say those that perpetuate the power of the otherwise powerful, are viable under the given conditions. Then institutions have no autonomous role to play. Conditions shape institutions and institutions only transmit the causal effects of these conditions. The question, thus, is how to distinguish effects of institutions from those of the conditions that give rise to them." Przeworski, A. (2004). "Institutions Matter?" *Government and Opposition* 39(4): 527.
[29] Moustafa 2007, 224.

from an everyday norm, the judge from an administrator, and the courtroom or tribunal from a dispute among private citizens.

The external critique also points us toward a dynamic, dialogic approach toward conceptualizing regime-judiciary relations. As the balance of power between state and society changes, so will the regime's relationship with the judiciary, perhaps prompting the regime to crack down on judicial independence. But this does not mean that judicial personnel are helpless in the face of greater political forces – far from it. For example, some might try to reassure the regime of their loyalty or apoliticism. Others might seek to heighten the costs of retrenchment, perhaps by leveraging popular opinion or joining the opposition. Still others may attempt to "hide" from the regime by disguising themselves as non-judicial personnel. Finally, with the prevailing balance of power always in flux and unevenly distributed across the country, we should not expect to find a single relationship between the regime and its judiciary, but rather many different relationships with many different judiciaries. What registers as state weakness in one context may be a sign of strength in another. The resulting patchwork of institutions and strategies presents us with a far more complex picture than the standard Rule by Law model tends to allow.

One of the major objectives of this dissertation is to apply these lessons to the Sudanese case. As will be shown, Sudan's regimes frequently empowered some judicial institutions while simultaneously reining in others. These decisions were made within a specific ideational context, one based on regime assumptions about the habits and values of the judicial actors involved. In this sense, Sudan's pluralistic legal landscape generated opportunities for creative regime strategizing that would not have been feasible within the stronger, more legally homogenous states that dominate the Rule by Law literature.[30] Moreover, this dissertation will show how the ambiguity surrounding the law was itself productive of a certain kind of state sovereignty. Unlike in strong states where judicial institutions are more easily identified and defined, the contours of Sudan's judicial institutions were under continuous negotiation. What distinguishes a legal matter

[30] See Ginsburg and Moustafa 2008 for a representative sample. Of the twelve case studies examined by the volume's contributors, only one (Uganda) is ranked in the top thirty least stable states, according to the FFP's 2014 Fragile States Index.

from a political one, or a law from a norm? The persistent weakness and intense pluralism of the Sudanese state left these questions unsettled, allowing the regime to determine their answers in politically useful ways.

III. Law and Sovereignty

Of course, political scientists are not the only ones attempting to rethink the relationship between law, institutions, and the state. By emphasizing the dynamic and "uneven" texture of regime-judiciary relations, this dissertation also draws on recent work by historians and anthropologists of law, particularly those who study the legal systems of colonial Africa and Asia. These scholars have sought to call into question the very idea of colonialism as an order-making enterprise, choosing instead to locate the production of sovereignty "in the margins" of the state.[31] As a result, their work complicates what we might otherwise take to be a basic assumption of regime-judiciary relations: that the state *wants* to control its judiciary.

As a point of departure, let us consider a classic work of African legal anthropology, Martin Chanock's *Law, Custom, and Social Order*.[32] This book, now nearly thirty years old and immensely influential in its field, traces the development of "customary law" in colonial Malawi and Zambia. It made what was then the novel argument that customary law was not, as an earlier generation of anthropologists had supposed, a primordial relic of the pre-colonial era, but rather the creation of colonialism itself. By formalizing certain norms and institutionalizing specific practices, British administrators produced a body of law that was allegedly customary in nature, but in fact was designed to facilitate the economic and political order of the colonial state. While colonial administrators declared, often with great sincerity, their respect for pre-colonial African customs, the law they produced was in fact "the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion."[33] Coming on the heels of the publication of Eric Hobsbawm and Terrance Ranger's *The Invention*

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[31] I borrow this turn of phrase from Das, V. and D. Poole, Eds. (2004). *Anthropology in the Margins of the State*. Santa Fe: School of American Research Press.
[32] Chanock, M. (1985). *Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia*. Cambridge: Cambridge University Press.
[33] Ibid 4.

of Tradition,[34] Chanok's book fuelled an explosion of research on the colonial origin and purposes of customary law, leading to a much more skeptical attitude among scholars toward colonialism's legal legacy.[35]

A similar approach has come to dominate much of the literature on modern Islamic law as well. According to these scholars, the last one hundred and fifty years mark a time of enormous rupture in the Islamic legal tradition, so much so that it may no longer make sense to recognize it as such. Wael Hallaq, for example, has argued forcefully that the pre-modern *shari'a* was inextricably bound up in an organic and decentralized moral community, one that is fundamentally incompatible with the commitments and governing logics of the nation-state. As a result, the creation of colonial and post-colonial states in Muslim societies has essentially extinguished *shari'a* as an authentic legal tradition, in much the same way that African colonialism extinguished authentic customary law.[36] Similarly, Aharon Layish has stated that modern Islamic law, having been codified and transformed into statute, bears virtually no resemblance to *shari'a* as it was historically practiced, and furthermore that any attempt to reclaim it in the era of nation-states is "a lost battle".[37] These scholars and many others like them have clustered around a series of common ideas and themes: that codification has rendered Islamic law lifeless and inert,[38] that its pluralistic ethos has

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[34] Hobsbawm, E. and T. Ranger, Eds. (1983). *The Invention of Tradition*. Cambridge: Cambridge University Press.

[35] For examples of scholars either directly influenced by Chanock or working in a similar vein, see Killingray, D. (1986). "The Maintenance of Law and Order in British Colonial Africa." *African Affairs* 85(340): 411-437; Moore, S. F. (1986). *Social Facts and Fabrications: "Customary" Law on Kilimanjaro*. Cambridge: Cambridge University Press; Shadle, B. L. (1999). "'Changing Traditions to Meet Current Altering Conditions': Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60." *The Journal of African History* 40(3): 411-431; Snyder, F. (1981). "Colonialism and Legal Form: The Creation of "Customary Law" in Senegal." *The Journal of Legal Pluralism and Unofficial Law* 13(19): 49-90; Spear, T. (2003). "Neo-Traditionalism and the Limits of Invention in British Colonial Africa." *The Journal of African History* 44(1): 3-27.

[36] Hallaq, W. B. (2004). "Can the Shari'ah be Restored?" *Islamic Law and the Challenges of Modernity*. Y. Y. Haddad and B. F. Stowasser. Walnut Creek: Altamira Press.

[37] Layish, A. (2004). "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World." *Die Welt des Islams* 44(1): 108.

[38] Kugle, S. A. (2001). "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia." *Modern Asian Studies* 35(2): 257-313.

been fatally undermined by state sovereignty,[39] and that the moment *shari'a* becomes state law, it ceases to be Islamic.[40]

Though differing in their particulars, these treatments of customary and Islamic law share a vision of the state (colonial and postcolonial) as an order-making enterprise, and that the legal architecture it created was designed to ensnare pre-modern legal systems in that order. Through the defining of territory and identities, the codification of procedure, and the institutionalization of legal personnel, Islamic and customary law were rendered compliant, predictable, and ultimately compatible with the sovereign claims of the state. Some scholars, it should be noted, have been careful to leave space for resistance and contingency – to acknowledge, as one author put it in a discussion of colonial law, that even as "colonial subjects were incorporated into the legal ordering of social relationships, they themselves incorporated law within their techniques for resisting injustice within these relationships."[41] But regardless of whether or how the law supplies the means for its own opposition, the image of the state as an order-making process is pervasive throughout the literature, and indeed has become one of its central motifs.[42]

And yet, as John Comaroff has noted, there is something over-determined about this approach toward colonial and post-colonial law.[43] By framing the imposition of state

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[39] Jackson, S. (2006). "Legal Pluralism Between Islam and the Nation-State: Romantic Medievalism or Pragmatic Modernity?" *Fordham International Law Journal* 30: 158-176.
[40] An-Na'im, A. A. (2008). *Islam and the Secular State: Negotiating the Future of Shari'a*. Cambridge: Harvard University Press.
[41] Merry, S. E. (2000). *Colonizing Hawai'i: The Cultural Power of Law*. Princeton: Princeton University Press, 15.
[42] This has also been the approach of one of the most significant works on Sudan's judiciary to be published in recent years, Abdullahi Ali Ibrahim's *Manichaean Delirium.* Ibrahim argues that colonialism in Sudan operated through the separation of the judiciary into two reciprocally exclusive categories: A non-rational, traditional judiciary practicing *shari'a* and customary law, and a secular, modern judiciary to which it is subordinated. While these categories were often expressed at the level of ideology and rhetoric, in practice, the distinction was violated more often than Ibrahim allows. The resulting legal landscape is not Manichaean (that is to say, it is not a *binary* between the modern and pre-modern), but rather a much more complex and unstable constellation of orderings. These issues will be explored in greater depth in Chapter Two. Ibrahim, A. A. (2008). *Manichaean Delirium: Decolonizing the Judiciary and Islamic Renewal in the Sudan, 1898-1985*. Leiden: Brill.
[43] Comaroff, J. (2001). "Colonialism, Culture, and the Law: A Forward." *Law & Social Inquiry* 26(2): 307.

law as a process of order-making, it registers the persistence of non-state or non-colonial law as evidence of resistance. But there is nothing inherently incompatible between state hegemony and non-state law; to assume otherwise is to leave intact the essential claim of the state as a source of order in a world of disorder, illegality, and violence. The sorts of analysis described above present us with a vision of the colonial state that is terrifying in its power and ambition, one in which order is imposed through the relentless production of codes, procedure, and formal institutions. In reality, colonial rule was maintained as much through the recognition and facilitation of *natural* order, of adapting state institutions to take advantage of what colonizers took to be pre-colonial habits, identities, and ways of thinking.

This understanding of colonial logic is crucial for making sense of Sudan, both before and after the end of British rule. As will be argued in Chapter Two, almost from the very beginning of colonial rule in 1898, the British administration adopted a discourse of legal order and disorder. Sudan's cities and larger towns, where Egyptian and nationalist sentiment was especially potent, were identified as areas of dangerous legal disorder. As a result, they became the target of intense judicial reform, including the establishment of formal judicial institutions and legal codification. Sudan's countryside, on the other hand, was perceived by the colonial regime to be relatively stable and ordered, a characteristic that the British attributed to the enduring power of "tribal discipline". Whereas the colonial regime was intensely interested in regulating and monitoring judicial power in urban areas, so-called native courts were given relatively free rein to creatively combine political powers with judicial ones, often without much accountability to the central government. In short order, two discrete judicial systems emerged, one for urban areas and one for the countryside, the distinction between which was continuously being negotiated in legal and political discourse.

By the 1940s and 1950s, however, a new legal ideology was achieving widespread popularity in Sudan: legalism. The changing nature of the regime's opponents, as well as the growing post-war professionalization of the civil judiciary, had prompted a re-evaluation of law's nature. Where earlier legal ideologies had tolerated and even encouraged the intermixing of law and politics, legalism (an explicitly rule-

centric theory of law) took as its point of departure their total ontological distinction.[44] As Chapter Three argues, this reification of the political sphere from the legal one played an important role in the development of judicial independence, both as institutional arrangement and normative commitment. The rise of legalism to ideological dominance coincided with a growing faith by the regime in the judiciary's apoliticism. This set the stage for the rapid expansion of judicial power in the 1950s and 1960s (discussed in Chapter Four), even as the power of native courts continued to dwindle.

This complex interplay of regime strategies, legal ideologies, and judicial institutions reveals no single logic to colonial or post-colonial rule, no obvious commitment to an order-making project. Rather, Sudan's regimes displayed a remarkable willingness to tolerate and even promote legal disorder when it suited them to do so. As will be shown in Chapter Five, this tolerance for legal ambiguity extended into the realm of Islamic legal reform as well. When *shari'a* was reintroduced into the Sudanese legal system in the 1980s, the regime was careful to allow ample room for spontaneous and unplanned acts of judicial creativity – within clearly circumscribed limits, of course. This combination of ambiguity and clarity was a hallmark of Sudan's experiment in Islamic law, but has rarely been appreciated by scholars of the subject. A close examination of the Sudanese case, therefore, makes an important contribution to the literature on both post-colonial and Islamic law.

IV. Sudan as a Case Study

There are four principle reasons why Sudan is an excellent case for this sort of inquiry. First, the twentieth-century Sudanese state has run the gamut of regime type, constituency, economic system, and ideological orientation, allowing us to examine the effect of several variables on regime-judiciary relations. From 1898 to 1956, Sudan was effectively colonized by Great Britain, though control was technically shared with the Egyptian *khedive* as well.[45] For much of this period, Sudan resembled what Mahmood

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[44] Shklar, J. (1964). *Legalism: Law, Morals, and Political Trials*. Cambridge: Harvard University Press.

[45] This arrangement of shared rule stems from the peculiar manner in which Sudan was colonized. In 1820-21, the Egyptian ruler Mehmet Ali Pasha conquered much of what is now Sudan in the

Mamdani has called a "decentralized despotism," in which native elites and rural chiefs possessed a great deal of autonomy from the state, which had only limited ambition and material resources.[46] Following decolonization, however, the Sudanese state launched a much more aggressive campaign of institution-building and political centralization. Over the next thirty years, Sudan was ruled by four different governments, both democratic (1956-1958 and 1964-1969) and authoritarian (1958-1964 and 1969-1985). These governments, in turn, reflected constituencies ranging from urban Islamists to secular socialists, rural Sufis to Western-trained technocrats. The sheer diversity of state formation in Sudan renders it an incredibly fertile ground for scholarly study, particularly when a single governing tactic (in this case, the use of judicial institutions) can be traced throughout.

Second, judicial institutions *matter* in Sudan. Until quite recently, the tendency among public law scholars has been to discount the importance of judiciaries in authoritarian regimes, dismissing them as kangaroo courts or star chambers.[47] And if a judiciary is nothing more than a cipher for executive power – if, to use Thompson's phrasing, it masks and legitimizes nothing – then it is epiphenomenal to any analysis of political change. But this simply does not fit the facts of the Sudanese case. All of Sudan's regimes have cared deeply about the form, powers, and ideologies of the judicial branch. They have invested enormous resources into programs of judicial reform, and in

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(ultimately mistaken) belief that it would furnish him with new soldiers for his army. Egyptian rule was overthrown in 1885, however, when Muhammad Ahmad, an initiate in the Sammaniyya order and self-proclaimed Mahdi, led an uprising against the *khedive*. Though Egypt succeeded in re-conquering Sudan thirteen years later, it did so with an army led and equipped largely by Great Britain, which was eager to assert its control of the Nile Valley. As a result of this joint re-conquest, Egypt and Great Britain agreed to rule as equal "Codomini," though in reality Egypt exercised very little direct authority in Sudan. For a revisionist account of the reasons for Egypt's original conquest of Sudan, see Fahmy, K. (2003). *All the Pasha's Men: Mehmet Ali, His Army and the Making of Modern Egypt*. Cairo: The American University in Cairo Press. On the Mahdi and his rule, see Holt, P. M. (1958). *The Mahdist State in the Sudan, 1881-1898*. Oxford: Clarendon Press. On the establishment of the Condominium agreement, see Daly, M. W. (1986). *Empire on the Nile: The Anglo-Egyptian Sudan, 1898-1934*. Cambridge: Cambridge University Press.

[46] Mamdani, M. (1996). *Citizen and Subject: Contemporary African and the Legacy of Late Colonialism*. Princeton: Princeton University Press.

[47] See for example Tate, C. N. (1995). "Why the Expansion of Judicial Power," In *The Global Expansion of Judicial Power*. C. N. Tate and T. Vallinder. New York: New York University Press, 28-29.

the process have transformed the courts into major sites of political contestation. The Sudanese judiciary should matter to scholars because it so obviously matters to the regime.

Third and relatedly, the Sudanese judiciary has been the subject of intense reform and transformation during the twentieth-century, often adopting configurations that are wholly unique among Muslim-majority countries or within either Africa or the Middle East. For example, Sudan was one of the only Arab countries to adopt the common law.[48] This peculiarity of the Sudanese legal system was vigorously opposed by many factions in the country, and in the early 1970s was briefly replaced (at great cost and with enormous controversy) by the civil law instead. In the 1980s, meanwhile, the government turned its back decisively on civil and common law alike, implementing instead a series of legal codes and institutional reforms based on *shari'a*, or Islamic law. For this, it has been termed the "First Islamist Republic,"[49] and remains to this day one of the most ambitious and enduring experiments in modern Islamic legal reform.

Finally, the judiciary's tumultuous career has furnished us with a vast amount of material from which to construct a proper history and political analysis. Yet while historians and anthropologists have produced a number of important studies of the Sudanese judiciary in recent years,[50] the methods of political science and public law scholarship have rarely been brought to bear on the subject.[51] Moreover, many of the most important studies of the judiciary limit their focus to only a select set of judicial institutions or a specific period of time. This can partly be explained by the outsized importance given to the Islamic reforms of the 1980s and 1990s, which have understandably attracted a great deal of attention from scholars.[52] One of the

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[48] Mallat, C. (2007). *Introduction to Middle Eastern Law*. Oxford: Oxford University Press, 240.
[49] Gallab, A. A. (2008). *The First Islamist Republic: Development and Disintegration of Islamism in the Sudan*. Aldershot: Ashgate.
[50] See for example Fluehr-Lobban, C. (2012). *Shari'a and Islamism in Sudan: Conflict, Law and Social Transformation*. London: I. B. Tauris; Ibrahim 2008; Layish, A. and G. R. Warburg. (2002). *The Reinstatement of Islamic Law in Sudan under Numayri*. Leiden: Brill.
[51] Important exceptions include Massoud 2013; Mustafa, Z. (1971). *The Common Law in the Sudan: An Account of the 'Justice, Equity, and Good Conscience' Provision*. Oxford: Clarendon Press.
[52] Fluehr-Lobban, C. (1987). *Islamic Law and Society in the Sudan*. London: Frank Cass and Company Limited; Fluehr-Lobban 2012; Al-Kabbashi, A.-M. T. (1986). *Taṭbīq al-Sharī'a al-*

consequences of this tendency, however, is that scholars frequently have difficultly placing Sudan's implementation of Islamic law within the larger history of legal reform, presenting it instead as purely the product of pressure from the country's Islamist movements.[53] This combination of plentiful research materials and relative lack of scholarship renders Sudan an extremely attractive case for further study.

V. Methodology, Sources, and Organization of the Dissertation

This dissertation adopts a historical institutionalist methodology to explain the development of regime-judiciary relations in Sudan. Through its sensitivity to both institutional legacies and the impact of critical junctures, historical institutionalism offers a way of explaining the timing of and reasons for why change does (or does not) occur.[54] In addition, there are two main reasons why this project is particularly well suited to a historical institutionalist methodology. First, historical institutionalism views preference formation as occurring through and within the institutional context. This distinguishes it from rational choice theory, wherein interests and objectives are formed at the individual level prior to any exposure to the institution itself.[55] Because of this, rational choice theory would have a difficult time accounting for the often times decisive role played by legal education and judicial professionalization in shaping preferences within the

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Islāliyya fī al-Sūdān bayna al-Haqīqa wa al-Ithāra. Cairo, Al-Zahra li'l-I'lam al-Arabi; Khalid, M. (1986). *Al-Fajr al-Kādhib: Numayrī wa Taḥrīf al-Sharī'a*. Cairo: Dar al-Hilal; Layish and Warburg 2002; Massoud 2013; Zein, I. (1989). "Religion, Legality, and the State: The 1983 Sudanese Penal Code." (PhD diss., Temple University).

[53] For examples of this tendency, see Abdulsalam, E.-M. (2010). *Al-Haraka al-Islāmiyya al-Sūdāniyya: Dā'ira al-Ḍū', Khūyūt al-Ẓalām*. Cairo: Dar Madarik; de Waal, A. and A. H. Abdel Salam. (2004). "Islamism, State Power and *Jihad* in Sudan." *Islamism and Its Enemies in the Horn of Africa*. A. de Waal. Bloomington: Indiana University Press; El-Affendi, A. (1991). *Turabi's Revolution: Islam and Power in Sudan*. London: Grey Seal; Gallab 2008; Burr, J. M. and R. O. C. (2010). *Sudan in Turmoil: Hasan al-Turabi and the Islamist State*. Princeton: Marcus Weiner; Salomon, N. (2009). "The Salafi Critique of Islamism: Doctrine, Difference and the Problem of Islamic Political Action in Contemporary Sudan." *Global Salafism: Islam's New Religious Movement*. R. Meijer. New York: Columbia University Press; Sidahmed, A. S. (1997). *Politics and Islam in Contemporary Sudan*. Surrey: Curzon; Warburg, G. R. (1990). "The Sharia in Sudan: Implementation and Repercussions, 1983-1989." *Middle East Journal* 44(4): 624-637.

[54] Thelen, K. (1999). "Historical Institutionalism in Comparative Politics." *Annual Review of Political Science* 2: 369-404.

[55] Green, D. and I. Shapiro (1996). *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science*. New Haven: Yale University Press, 20.

Sudanese judiciary. Second, historical institutionalism rejects the functionalism that characterizes many rational choice theories of institutional change.[56] As a result, it is better equipped to explain the influence of contingency, miscalculation, and disagreement – all of which were prominent factors in Sudan's regime-judiciary relations. The judiciary is a deeply pluralistic and multi-vocal collection of institutions that cannot be studied in isolation from one another. Historical institutionalism captures this complexity, and ultimately incorporates it into its explanatory framework.

In the course of the following four chapters, I trace the development of Sudan's judicial institutions from the beginning of Anglo-Egyptian colonial rule in 1898 to the great "Judicial Revolution" (*thawra al-qaḍā'īyya*) of the early 1980s under President Ja'far Numayri.[57] By adopting such a long timeframe, I am able to show the commonalities of executive-judiciary relations, despite the diversity of regime types in twentieth-century Sudan. Moreover, I subscribe to a broad definition of "judicial institutions" in this dissertation, encompassing not only the civil and *shari'a* courts that tend to dominate the literature on Sudan's judiciary, but also non-traditional dispute resolution bodies, including tribal councils and civil service disciplinary boards.[58] As is often noted, Sudan is a country of extreme legal pluralism. By applying such a wide (but far from exhaustive) conception of the judiciary, this dissertation is able to capture some of that pluralism and arrive at a much more complete picture of judicial politics.

First, however, an admission: there is a pronounced "northern bias" in this dissertation. By that, I mean that relatively few of the events, institutions, texts, and personalities I analyze are from the region that now constitutes South Sudan. The primary reason for this is that for much of the time period that this dissertation covers, Sudan's north and south were locked in a brutal civil war, leaving the state with little direct influence over the southern judicial system. Even prior to the outbreak of

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[56] Bates, R. (1997). "Comparative Politics and Rational Choice: A Review Essay." *The American Political Science Review* 91(3): 699-704.
[57] "Comprehensive Judicial Revolution," *Al-Ṣahāfa*, August 12, 1983, p. 1.
[58] Works that limit their focus to civil and *shari'a* courts include Fluehr-Lobban 1987; Hawley, D. (1991). "Law in the Sudan under the Anglo-Egyptian Condominium." *The Condominium Remembered: Proceedings of the Durham Sudan Historical Conference, 1982*. D. Lavin. University of Durham: Centre for Middle Eastern and Islamic Studies; Layish and Warburg 2002; Massoud 2013; Mustafa, 1971; Zein 1989.

hostilities, the British colonial government maintained a "closed districts" policy that muted the impact of national judicial institutions outside the north. Instead, the primary judicial actors in the south were "tribal" chiefs who emerged alongside the colonial state, serving simultaneously as its interpreters, local representatives, and dogged competitors.[59] An analysis of these micro-relations, while of enormous value, is simply beyond the scope of this project. In addition, the source base for regime-judiciary relations in the north is far richer than in the south. This too is a consequence of the state's limited penetration into the south during the post-colonial period.

Sources for this dissertation are primarily textual in nature. Despite repeated attempts over a two-year period, I was unable to secure a visa to enter Sudan. I do not doubt that my inability to carry out interviews and archival research in Sudan has deeply affected the course of my research. In particular, I expect it to have influenced the relative weight this dissertation has placed on the "official" version of events. Nevertheless, I have tried to address this problem by drawing on a wide variety of materials from as many different perspectives as possible. Chapters Two and Three, which survey legal developments during Sudan's colonial period, draw on a range of archival materials contained at the Sudan Archive at Durham University and the National Archive in London, including court records, case notes, diplomatic communiqués, police reports, and inter-departmental communication within the British colonial government. To avoid an excessively urban bias in my source base, I have also drawn on journals, personal letters, and reports composed by district commissioners and other staff employed in the countryside. Where possible, I have incorporated Sudanese sources as well, with a particular focus on memoirs, contemporary journalism, and government petitions. There is, nonetheless, a decidedly British slant to many materials used in the first half of this dissertation. Chapters Four and Five analyze events following decolonization, and therefore draw much more on Arabic-language sources. These include newspapers (in particular the popular dailies *Al-Ṣahāfa* and *Al-Ayām*), government reports and memoranda, intelligence reports, legislation, administrative journals, political speeches, personal memoirs, works of literature, and religious tracts.

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[59] Leonardi, C. (2013). *Dealing with Government in South Sudan: Histories of Chiefship, Community and State*. Suffolk: James Currey.

Sudan's legal community is blessed with an excellent law journal, the *Sudan Law Journal & Reports*. Publication began in 1956, with a gradual shift from English to Arabic occurring in the early 1970s. In general, it contains the most important appellate and High Court decisions from the previous year, as well as scholarly essays by lawyers, judges, and law professors. The University of Khartoum experimented with its own journal, the *Khartoum Law Journal*, but only one issue was ever published (though recent attempts have been made to revive it). Another valuable source for insight into legal developments is the *Sudan Journal of Administration and Development*, published since 1960 by the Institute of Public Administration. Though not focusing explicitly on the law, it nevertheless touches on many important legal matters, especially as they relate to the civil service and economic development.

The dissertation is organized into four substantive chapters. Chapter Two, "Native Courts and the Ambiguity of Law, 1898-1934," introduces the basic contours of the early colonial judiciary and its place within the Sudanese political system. The main focus of the chapter, however, is on the special role played by Native courts. Under the policy of "Native Administration," the British colonial government conferred expansive judicial and administrative powers on tribal sheikhs and *nāẓirs* (chiefs), while at the same time discouraging many attempts to formalize or standardize those powers, preferring instead that they remain informal and undefined. This policy, which I term "strategic ambiguity", emerged out of a belief that tribal leaders would be more effective if they possessed maximum discretion and judicial flexibility, even though the result was a colonial government woefully ill-informed about much of its own judicial system. According to colonial administrators, tribal leaders could be entrusted with these powers because they were constrained by "tribal discipline", a supposedly natural order that would prevent them from exceeding certain limits. These findings point to a way of thinking about colonial-era legal reform in which governmental ignorance was actually productive of sovereignty, and not an obstacle to it. They also illustrate the value of adopting a "patchwork" model of regime-judiciary relations, in which one set of judicial institutions can enjoy very different relations with the regime than another.

Chapter Three, "The Politics of Judicial Independence, 1945-1956," charts developments within the civil judiciary during the late colonial period. Following the

Second World War, the weight of judicial power shifted from the Native courts to the civil judiciary, which had become an important site of contestation between the regime and the nationalist movement. Out of this contest, the concept of judicial independence emerged in Sudan as a point of widespread approval and support, even within the colonial regime. In this chapter, I argue that the concept of judicial independence functioned as a strategy for defining the limits of acceptable politics. To declare an office, action, or discourse as "legal" in nature was to de-politicize it, and thus served to place it outside of the sphere of public contestation. As such, it was a potent tool for nearly all of Sudan's political actors, capable of deflecting, negating, amplifying, and concealing political power. Furthermore, I argue that the principle of judicial independence did not emerge in Sudan in order to safeguard or promote the distinction between law and politics – on the contrary, it was precisely this discourse of judicial independence that *produced* the distinction in the first place. That is, the language of judicial independence established the notion of law and politics as autonomous spheres, and not the other way round.

Chapter Four, "The Rise and Fall of Judicial Power, 1956-1976," explores the emergence and eventual collapse of judicial strength during the early post-colonial period. The years immediately following independence represent the high point of judicial power in Sudan. Decolonization had left most other state institutions weak and fragmented, giving the judiciary the space it needed to assert its autonomy and jurisdictional authority. Judicial norms and procedures, meanwhile, were exported to other state institutions as well, particularly to the rapidly expanding bureaucracy, which was beginning to show worrying signs of corruption and inefficiency. But even as judicial norms achieved widespread currency, they attracted the ire of Sudan's rulers, both democratic and authoritarian, who feared that the courts were growing too powerful. Under the rule of Ja'far Numayri in the early 1970s, a new and more powerful regime emerged. One of its first orders of business was to rein in the power of the judiciary, which it accomplished by constructing a parallel judiciary of special courts into which controversial and politically sensitive cases could be channeled. Amidst an increasingly fractured judicial landscape, tensions between judges and the regime continued to mount, even as new voices emerged in government urging sweeping legal reform.

Chapter Five, "Islam, State Power, and the 'Judicial Revolution', 1977-1985," brings together all the major themes explored in this dissertation and applies them to a seminal moment in Sudan's legal history: Numayri's great "Judicial Revolution". His regime, faced with growing opposition from the judiciary and a resurgent Islamist movement, introduced a series of reforms designed to bring Sudan's legal system into conformity with *shari'a*. Interestingly, these reforms transferred an enormous amount of power and discretionary authority to the judiciary, even as its personnel remained deeply hostile to the regime and its interests. In this chapter, I explore this seeming paradox, showing both why the reforms were implemented and why they took the shape that they did. Ultimately, Numayri believed that by bringing Sudan's laws into conformity with *shari'a*, the country's legal system would grow more flexible, efficient, and compliant toward the regime.

Ultimately, this dissertation is about judicial power. At first glance, the Sudan's judicial branch would seem to be doubly cursed – first because its government is authoritarian, and second because its state is weak. And yet despite these challenges, *and very often because of them*, the judiciary in Sudan is strong. It has been the recipient of a decades-long policy, by both colonial and post-colonial regimes, favoring empowerment and institutional independence. This policy emerged out of the belief that a flexible and suitably empowered judiciary would be better able to respond to the unpredictable threats of Sudanese political life. In order to understand this policy, however, we need to also understand the constellation of theories, ideas, and values that structured regime-judiciary relations in Sudan. Over the course of the following four chapters, I explore the interaction of this ideational context with the regime's own over-riding concern with its power and security. As such, this dissertation makes an important theoretical contribution to the Rule by Law literature, which has often failed to take ideas seriously or note their role in structuring institutional behavior. It also sheds valuable light on an influential case of African legal reform in a pluralistic society, one that has received relatively little attention from scholars.

CHAPTER TWO: NATIVE COURTS AND THE AMBIGUITY OF LAW, 1898-1934

Introduction

In December of 1957, as Sudan was preparing to celebrate the second anniversary of its independence from Anglo-Egyptian rule, the High Court of Appeal intervened in a family quarrel. For forty years, a man named William Mahrous had lived in the home of his wealthy uncle, Sawiris, in the northern town of Atbara. After Sawiris's death, however, his children sought to have Mahrous evicted. The case was brought to court, and in his defense, Mahrous claimed that according to the local custom of the area, his long residence in the house earned him a right of occupancy. Since Sudanese law recognized the force of custom in settling property disputes, this defense required the court to determine two questions: First, whether Mahrous's description of Atbari custom was accurate, and second, whether it should prove decisive in this case.

In its decision, the court answered the first question in the affirmative and the second in the negative. Its reason for doing so, however, is quite peculiar. According to the court, it may well be customary in Atbara for the rich to provide housing to their poor relations, but so what? Such a custom existed everywhere in Sudan. "The facts of this case disclose no aspect which is not noticeable in everyday life everywhere or which is inconsistent with a practice common to all parts of this country whereby a prosperous member of the family provides shelter and shade for the indigent." According to the judges, the ubiquity of familial care in Sudan actually undermined its authority, transforming it from a custom into something lesser – a *value* – and the state was not going to get in the business of enforcing values, not when the consequences could be so dire. "If the courts are to lend themselves so easily to claims of this sort and to assume that everyone circumstanced as [the defendant] in this case has a right which he can enforce against his benefactor's heirs, then charity would become restrained, kinship

forsaken and life intolerable." In light of these dangers, the High Court of Appeal found against William Mahrous and ordered his eviction.[1]

We do not know what happened to the Mahrous family; one hopes that they eventually reached some sort of accommodation. Their case, however, raises a number of fascinating questions about law, knowledge, and the power of the state. How is it that the popularity of a norm is precisely what invalidates it as law? What is the relationship between customary law and the African colonial state, and what can this relationship tell us about how political rule is sustained amidst deep legal pluralism? Finally, during moments of national crisis and instability, how does a weak state put its judicial institutions to work?

These are some of the questions I address in this chapter, which surveys the development of Sudan's legal system from colonization in 1898 to the mid-1930s. During this period, the British colonial government embraced a policy of Native Administration (*al-Idāra al-Ahliyya*) in which wide judicial power and discretion were transferred from the formal state judiciary to the so-called "tribal" or village courts that populated Sudan's countryside. This policy was part of a concerted effort by the colonial state to respond to the growing danger posed by the nationalist movement, which threatened to upend British rule both in Sudan and in Egypt. Since the appeal of nationalism was felt most keenly among the urban *effendiyya* that constituted Sudan's central bureaucracy, Native Administration aimed to shift judicial authority from the cities to the countryside. However, at this time of great unease and state fragility, the colonial government adopted a seemingly self-defeating strategy: it promoted legal informality instead of formality, discouraged codification, and purposely reduced its own knowledge of how law in within the tribe was conducted. Simply put, the policy of Native Administration was premised on the idea that the less the colonial government knew about customary law, the better.

This policy, which I call "strategic ambiguity", involved the intentional cultivation of legal informality and uncertainty – two qualities that lay at the heart of the regime's relationship toward its tribal judiciary during the 1920s and 1930s. To illustrate

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[1] *Heirs of Sawiris Mahrous v. William Morgos Mahrous*, 1960.

how strategic ambiguity was deployed in the field, I examine the case of Ali al-Tom (1874 – 1937), chief of the Kababish tribe in northern Kordofan Province and the linch-pin of the colonial regime's policy in central Sudan. Unquestionably the most powerful tribal leader of his day and one of the country's three or four most important political figures prior to independence, al-Tom commanded enormous influence within the Sudan Political Service (SPS), where his opinion on matters of tribal administration was eagerly sought. Yet as we shall see, despite his prominence, the government explicitly discouraged him from adopting any single set of legal procedures or specified powers. According to the logic of the colonial state, by simultaneously empowering the native courts and keeping those powers in a state of ambiguity, it hoped to create a judiciary capable of responding quickly and creatively to the unpredictable nature of political life.

As I argue below, this strategy was only possible due to Sudan's deep legal pluralism and fragmented politics. A more powerful, legally homogenous colony would have had a difficult time sustaining this sort of legal ambiguity, even assuming that its government would choose to endorse it. In Sudan, by contrast, Native Administration was official regime policy from the early 1920s until well into the 1930s. The country's legal system was sufficiently diverse and its political authority sufficiently fragmented that the regime could creatively rearrange judicial power in response to various crises. Moreover, this chapter complicates the notion that authoritarian regimes always have an interest in defining the nature and limits of judicial power. During moments of great political weakness and uncertainty, it may prefer instead to rule through a judiciary whose powers are at once vast, informal, and impossible to define.

This chapter is divided into four sections. In the first section, I elaborate on the notion of strategic ambiguity, locate its origins in the relevant literature, and address several possible critiques of my argument. In the second section, I trace the history of the colonial judiciary from the Anglo-Egyptian occupation of Sudan in 1898 to the mid-1930s. In addition to describing the political crisis that led to the adoption of Native Administration, I analyze its intellectual origins in British colonial discourse. In the third section, I turn to the specific case of Ali al-Tom. By including this micro-history within the larger analysis of regime-judiciary relations, I am able to show what strategic ambiguity looked like "in the field" and shorn of all abstraction. Finally, in the fourth

section, I examine the implications of this argument, both for our understanding of Sudanese law and the study of judicial politics in colonial Africa.

I. A Theoretical Account of Strategic Ambiguity

The relationship between the so-called native courts and the national judiciary has always been a fraught one in Sudan, and various governments, particularly that of President Ja'far Numayri (1969 – 1985), have sought to abolish the native courts all together, though never with any lasting success.[2] Sudanese Islamists and secular nationalists, two groups that tend to agree on very little, have been vociferous critics of these courts throughout the country's recent history, condemning them as rivals to the authority of both *shari'a* and national law. And in the early years of the post-colonial state, they were denounced as agents of a neo-feudal order, one in which a captive peasantry was dominated by an incompetent and corrupt tribal leadership.[3]

Such conflicts between the law of nations or religions and the customs of local chiefs have prompted some scholars to frame judicial politics in the colonial and post-colonial African state as a "zero-sum game," in which the expansion of the state necessarily entails either the elimination of the tribe or the destruction of its judicial independence.[4] According to such scholars, the persistence of native courts into the post-colonial period has occurred *in spite* of the state, and not because of it – that their continuing refusal to abandon an uncodified or informal system of law represents an act of *resistance* to the centralizing, standardizing efforts of the state.[5]

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[2] Abu Shouk, A. I. (1998). "Kordofan: From Tribes to Nāẓirates." *Kordofan Invaded: Peripheral Incorporation and Social Transformation in Islamic Africa*. E. Stiansen and M. Kevane. Leiden: Brill Press, 140.

[3] Al-Bashir, H. (1966). "Al-Idāra al-Ahliyya fi al-Sūdān." *Sudan Journal of Administration and Development* 2: 25-36.

[4] Van Rouveroy van Nieuwaal, E. A. B. (1992). "The Togolese Chiefs: Caught Between Scylla and Charibdis?" *Journal of Legal Pluralism and Unofficial Law* 32: 21.

[5] Van Rouveroy van Nieuwaal 1992; van Rouveroy van Nieuwaal, E. A. B. (1996). "State and Chiefs: Are Chiefs Mere Puppets?" *Journal of Legal Pluralism and Unofficial Law* 38: 39-78; von Trotha, T. (1996). "From Administrative to Civil Chieftaincy: Some Problems and Prospects of African Chieftaincy." *Journal of Legal Pluralism and Unofficial Law* 38: 79-107. But see Awasom, N. F. (2003). "The Vicissitudes of Twentieth-Century Mankon *fons* in Cameroon's Changing Social Order." *The Dynamics of Power and the Rule of Law: Essays on Africa and Beyond*. W. van Binsbergen. Leiden: African Studies Centre.

Yet must this always be the case? My intention here is to make a case for *strategic ambiguity*, a term I use to describe the intentional obscuring by the state of legal procedure and institutions within a particular jurisdiction, such that the state itself is deprived of legal knowledge. If, as James Scott has argued, the modern state achieves its hegemony by rendering local knowledge and lifestyles "legible" (i.e. standardized, predictable, and abstract) to national rulers in faraway capitals, then what I am presenting here is its inverse: the strategic production of illegibility.[6] In doing so, I hope to dramatize some of the limits of law as the hegemonic language of the African colonial state, one in which the irreducible differences and contradictions of the colony achieved a measure of commensurability.

I do not mean to deny that law in Sudan often played this role – indeed, colonial administrators were deeply invested in the promotion and deployment of law as a means for defining, in a mutually intelligible fashion, the terms under which people, animals, and objects could all meaningfully interact with one another.[7] But law only *appears* to secure this commensurability.[8] The vocabulary of the law is always incomplete. While it conjures up a sense of precision and reliability, what it offers is an approximation of the intended meaning, and from that slippage will arise misunderstanding, confusion, and incoherence.[9] Moreover, the process through which natives are transformed into legal subjects is itself a profoundly disruptive one. Not only will it generate resistance, but even where it succeeds, it will have unintended consequences that may ultimately contradict or complicate other objectives of the state. Thus, one of the central paradoxes

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[6] Scott, J. (1998). *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press.

[7] For a detailed and persuasive description of how successive Sudanese states have used the law to secure their rule, Massoud, M. F. (2013). *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge: Cambridge University Press.

[8] Comaroff, J. and J. Comaroff (2006). "An Introduction." *Law and Disorder in the Postcolony*. J. Comaroff and J. Comaroff. Chicago: University of Chicago Press, 32.

[9] According to Hannah Arendt, this gap between the "lived spirit" of human action and the "dead letter" of the law is part of the price we must pay when we attempt to render durable and worldly something as fleeting as speech. And once paid, our laws still will never be "entirely reliable safeguards against action from within the body politic, just as the boundaries of the territory are never entirely reliable safeguards against action from without." Political life is too unpredictable, and human action too boundless, to be so easily contained. Arendt, H. (1998). *The Human Condition*. Chicago: University of Chicago Press, 95 and 191.

of the African colonial state was that even as its formal authority and disciplinary powers reached their apogee, the actual business of social control became more and more elusive.[10]

This notion of ambiguity as *productive* of hegemony reflects a growing recognition in the scholarly literature that those features of a state that are normally considered marks of failure or weakness may actually be precisely what make meaningful social control possible. In cases as diverse as the informal economy of the Chad Basin,[11] to the overlapping and contradictory jurisdictions of the US justice system,[12] to the recognition of "quasi-sovereignty" in colonial India,[13] there is compelling evidence that legal ambiguity and informality can be a boon for states, and not just a challenge. Informal legal systems, precisely because they are so ambiguous, are also more flexible and better able to respond to the uncertain nature of political life. During moments of profound political danger or weakness, it may make sense for a state to forgo legal standardization, and promote a versatile, undefined system of dispute resolution instead.

It is important, however, to carefully locate my argument in time and place. Rather than posit a unified, trans-historical theory of colonial legal reform, I limit myself to a specific moment in late African colonialism.[14] While my suspicion is that a policy of strategic ambiguity is as common to liberal democracy as it is to African colonialism,[15]

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[10] Comaroff, J. (1998). "Reflections on the Colonial State, in South Africa and Elsewhere: Factions, Fragments, Facts and Fictions." *Social Identities* 4: 336.

[11] Roitman, J. (2005). *Fiscal Disobedience: An Anthropology of Economic Regulation in Central Africa*. Princeton: Princeton University Press.

[12] Cover, R. M. (1981). "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation." *William and Mary Law Review* 22: 639-682.

[13] Benton, L. (2010). *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900*. Cambridge: Cambridge University Press, 222-278.

[14] That is, the period after the 1884 Conference of Berlin, during which the "Scramble for Africa" began in earnest and vast territorial claims were asserted over the African interior.

[15] In addition to Cover 1981, Bonnie Honig has an insightful analysis of how legal ambiguity and exceptionality are intrinsic to democratic life. By attempting to render the law as predictable and legible as possible, and by renouncing all exceptionality and decisionism, we paradoxically deprive ourselves of the very instruments of self-rule that democracy is designed to permit. Thus, our disavowal of ambiguity leads us to "disavow something else too: our human inaugural powers, which law *refuses but also offers* to its subjects: It refuses human agency when it aspires to regulate, command, and police us while also, of course, remaining dependent on us, its subjects, to *do* the regulating, commanding, and policing that the rule of law postulates and

perhaps it is with the latter that its *intentionality* is most apparent. And it is important that this intentionality be clearly and persuasively established, because the most obvious alternative explanation for these exceptions to traditional juridical sovereignty is to attribute them to state weakness or incompetence. Indeed, there is a strong tradition within the scholarship on the African colonial state that sees legal informality in general, and Native Administration in particular, as the product of a weak state apparatus forced by circumstance to acknowledge its own limitations.[16] Thus, what I call "strategy," these scholars might dismiss as a grudging admission of defeat.

While much of the next two sections is dedicated to rebutting these criticisms, it will be helpful to briefly address them here. First, while it would be a generalization to speak of colonialism of *any* period as if it were a unitary and undifferentiated experience, there exist certain qualities common to African colonial states that suggest something more than contingency at work in the promotion of strategic ambiguity. As Lauren Benton has observed, these states *assumed* their legal hegemony over indigenous law to a degree unequaled during earlier periods of colonialism in Asia, the Americas, or coastal Africa. Thus, unlike in India, where a plural legal order was accepted by the British only once the hegemony of state law proved unworkable, in Africa "the explicit dominance of state law was what made legal pluralism possible as a colonial strategy. Indigenous law was recognized precisely when it was no longer considered to offer a true alternative to the power of the colonial state."[17] This is not to deny that African colonial states encountered resistance from native legal systems; rather, it is that the plural legal order was generated *in response* to that resistance, as well as to the other difficulties associated with a heterogeneous and highly mobile population.

Second, at the level of colonial rhetoric within the SPS, there was a great deal of vocal support for legal informality and disdain for codification and institutionalization.

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requires." Honig, B. (2009). *Emergency Politics: Paradox, Law, Democracy*. Princeton: Princeton University Press, 85.

[16] Berry, S. (1992). "Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land." *Africa: Journal of the International African Institute* 62: 327-355; Herbst, J. (2000). *States and Power in Africa: Comparative Lessons in Authority and Control*. Princeton: Princeton University Press.

[17] Benton, L. (2002). *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge: Cambridge University Press, 153.

Internal memos between district officers and the central government during the 1910s and 1920s reveal widespread consensus that the more tribal legal authority was formalized, the less useful it would be.[18] One does not see a colonial bureaucracy eager to extend the power of its formal judiciary, but rather one that was, if anything, extremely concerned with *over*-formalization, that the forces of regularization and codification were proving to be *too* successful and would have to be sharply curtailed. This is not the language of a weak state in retreat.

Finally, on many occasions, local elites and tribal leaders sought to embrace practices and reforms that would have resulted in greater contact with the state, only to be rebuffed by the regime. Ali al-Tom, for example, was prevented from sending his sons to Omdurman for education in a government school, and instead was forced by the colonial regime to import a tutor instead. As the tutor would later recount, al-Tom's handlers were concerned if the children were exposed "to a town considered as the cradle of the national movement and the source of political consciousness," it could have a dire impact on "the upbringing of children prepared for future chiefdom of one of the biggest tribes in western Sudan…."[19] As a result, a special "nomad school" was established in which the disciplinary impact of state education was explicitly avoided.

In the next section, I present the political and legal context in which Native Administration was adopted as official colonial policy. During the first thirty-five years of colonial rule, a complex array of judicial institutions was developed in Sudan. Some of these were created *ex nihilo*, while others were based on or took advantage of pre-existing methods of dispute resolution. Because of Sudan's fractured and pluralistic judiciary, however, the colonial government was able to pass from one institution to the next, empowering some and weakening others depending on the needs of the moment. The picture of regime-judiciary relations that emerges, therefore, marks a stark departure

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[18] See, for example, a memo from the Civil Secretary to an assistant district commissioner in Darfur regarding the threat posed to Ali al-Tom by excessive regulation: "[Ali al-Tom's] loyalty is unquestionable. But his position is not, and never has been, altogether an easy one since the maintenance of this authority and influence must depend to a considerable extent on his retaining the respect of his tribe and acting in conformity with tribal standards; these do not always square with Government regulations." MacMichael to Lampen, November 19, 1926, Sudan Archive Durham (SAD) 65/7/32.

[19] Najila, H. (1964). *Dhikrayātī fi al-Bādiyya.* Beirut: Dar Maktaba Al-Hayat, 27.

from the more straightforward model of judicial politics that typifies much of the literature on colonial African law. It also complicates the common equivalence within post-colonial scholarship of knowledge and power. In the case study presented below, ignorance of the law does not confound state power, but rather *facilitates* it.

II: The Shift Toward Native Administration

When a joint Anglo-Egyptian expeditionary force "re-conquered" Sudan in 1898, it encountered a legal system in profound disarray. Seventeen years earlier, Muhammad Ahmad bin Abd Allah, the son of a boatwright and an initiate into the Sammaniyya Sufi order, had proclaimed himself the Mahdi, or "expected one" of Islamic eschatology.[20] From his base in western Sudan, he had raised an army and defeated the Turco-Egyptian government that had ruled the country since 1821. Once in power, the judicial system he established was both highly personalistic and skeptical of perceived legal "orthodoxy". As heir to the Prophet Muhammad, the Mahdi considered divine inspiration (*ilhām*) to be one of the three primary sources of the law, along with the *sunnah* and the Qur'an. In practice, this meant that many legal decisions were made by the Mahdi personally and with little deference to traditional limits on *ijtihād*, or personal discretion. As a result, the *ulama* and most other members of the Turco-Egyptian legal bureaucracy were shut out of the judicial process.[21]

Following the Mahdi's death in 1885, his successor the Khalifa began to move toward a more bureaucratized system of judicial authority.[22] However, this process was still incomplete at the time of the Anglo-Egyptian invasion. As a result, the incoming British administration encountered an extremely weak and pluralistic legal system. In the cities and towns, the influence of the old Turco-Egyptian courts, which followed the Hanafi *madhab*, could still be felt. Elsewhere in the north, so-called "native courts" administered justice according to local custom (*'urf*) and the Maliki *madhab*. In the

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[20] The authoritative work on this period of Sudan's history remains Holt, P. M. (1958). *The Mahdist State in the Sudan, 1881-1898*. Oxford: Clarendon Press.
[21] Layish, A. (2000). "The Mahdi's Legal Methodology as a Mechanism for Adapting the Shari'a in the Sudan to Political and Social Purposes." *Revue des mondes musulmans et de la Mediterranee* 91(June): 221-238.
[22] Layish, A. (1997). "The Legal Methodology of the Mahdi in the Sudan, 1881-1885: Issues in Marriage and Divorce." *Sudanic Africa* 8: 38.

south, meanwhile, judicial authority was extremely fragmented, a consequence of the lack of central administration and the Mahdiyya's own failure to penetrate the *sudd*, the great southern swamp that extends for hundreds of miles south of Fashoda.

One of the first tasks of the nascent colonial administration, therefore, was to establish a functioning judiciary. Under the aegis of the newly formed Legal Department, a dual legal system was created. All criminal disputes, as well as cases involving matters of contract, tort, property, and trade, were heard by a secular court system known as the Civil Division, which practiced British common law and was headed until 1955 by a British chief justice. Matters of personal and family law, on the other hand, were heard by a special *Shari'a* Division led by a state-approved Grand Qāḍī. Other duties performed by Legal Department staff included land registration and settlement, the supervision of mosque construction, and record keeping. New legislation, which was produced at a prodigious rate during the first decade of British rule, was submitted to the Legal Department for review. Afterward, it was published in the official Sudan Government Gazette, a monthly English- and Arabic-language compilation of ordinances and regulations. And in areas where the courts had yet to penetrate, district commissioners were authorized to settle disputes. Though as employees of the Civil Department they had little formal legal training, they were nonetheless expected to follow the letter of the law.

The "Failure" of Orthodoxy

Nowhere in all this legal architecture was there any formal place for customary law. It is not difficult to discern why. The colonial regime was well aware that the Mahdi and his successors had drawn their strength from the Sufi orders and tribal confederations of Sudan's countryside. As a result, the British were initially deeply invested in the promotion of a heavily textualized and formal "Islamic orthodoxy," which they thought to be an antidote to the Sufi zeal of the Mahdiyya. In 1902, Governor General Reginald Wingate (1899-1916) issued the Mohammedan Law Courts Ordinance[23], which, together with the Mohammedan Law Courts Procedure Act of

[23] *Sudan Government Gazette* (*SGG*) no. 35, 1 May 1902.

1915[24], established the *Shari'a* Division of the judiciary. As with the Board of Ulama, which was created in 1910, these institutions were staffed entirely by Egyptians, who were thought to be better custodians of orthodoxy than the Sudanese. The first Sudanese-born Grand Qāḍī would not be appointed until 1947.[25]

Under the peculiar agreement that established the Condominium government in 1899, Egypt was to continue to play an important role in administering the Sudan.[26] Over time, this role came to consist of little more than paying salaries and forgiving debts, but Egyptians themselves dominated the ranks of the civil administration, and members of the Egyptian army were garrisoned in key cities and towns. While each province was headed by a British *mudir*, much of the actual business of governing was carried out by Egyptian *ma'murs* and sub-*ma'murs*. A bit further down the bureaucratic ladder, one might find a few educated Sudanese, but even then only in unimportant capacities and at a far lower wage. The first Sudanese sub-*ma'mur* would not be appointed until 1912.[27]

For political as well as financial reasons, this reliance on Egyptian personnel was initially viewed as a necessary evil. By the late 1910s, however, British concerns over another Mahdi were replaced by the fear that Sudan might fall victim to the same nationalist fervor that had taken hold in Egypt. The 1919 Egyptian revolution was a crystallizing moment, convincing Sir Lee Stack, who succeeded Wingate as Governor General (1917-1924), that the presence of Egyptians in the colonial administration was no longer acceptable. We can discern two factors at work here: First, the British feared that Egyptian bureaucrats and soldiers were radicalizing the native Sudanese population, and that the rising nationalist sentiment among the Sudanese was directly attributable to Egyptian influence. Second, Britain was eager to undermine any legal or diplomatic claim Egypt could make to sovereignty over the Sudan, and a large Egyptian presence

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[24] *SGG* no. 279, 15 May 1915.
[25] Fluehr-Lobban, C. (1987). *Islamic Law and Society in the Sudan*. London: Frank Cass and Company Limited, 35-38.
[26] Though *de facto* sovereignty in Sudan was exercised by Great Britain alone, the fiction of joint British and Egyptian rule was assiduously maintained until formal independence in 1956. Hence, Sudan's period of colonial rule is known as the Condominium.
[27] Daly, M. W. (1986). *Empire on the Nile: The Anglo-Egyptian Sudan, 1898-1934*. Cambridge: Cambridge University Press, 81.

there complicated those efforts.[28] In 1924, a series of nationalist uprisings broke out in cities across northern Sudan, fueling British suspicion further. When, on November 19th of that same year, Stack was assassinated in Cairo by Egyptian nationalists, suspicion turned to outright hostility. Within days, Britain demanded the full evacuation of all Egyptian troops from Sudan and ordered the immediate removal of all Egyptian bureaucrats from sensitive positions.

Having lost all its Egyptian personnel, the SPS had three options. First, it could import more British officers and civil bureaucrats, but this was rejected as prohibitively expensive. Second, it could recruit from among the educated *effendi* class of native Sudanese, but they were no longer trusted, having been judged too sympathetic to nationalist ideology. Its third option, however, was to take advantage of what had theretofore been regarded as an obstacle to colonial rule: the stubborn persistence of non-state legal institutions – specifically, tribal and village courts.

It is in this context, then, that we must understand the turn to Native Administration. With the Egyptians expelled and educated Sudanese discredited, the prevailing sentiment within the SPS was that administrative and legal authority ought to be devolved as quickly as possible to the tribal sheikhs. There had always been those within the government sympathetic to this view, but their words took on a newfound urgency in this period. The very qualities of the tribal sheikhs that had, up till then, rendered them unacceptable as legal and administrative authorities (e.g. their "primitiveness", their physical and economic distance from urban centers) suddenly became desirable traits, ones that inoculated them against the pernicious ideology of nationalism. C.P. Browne, governor of Berber province and an advocate for Native Administration, warned the government that unless it was ready to cede the public debate to "the irresponsible body of half-educated officials, students, and town riff-raff," it would have to strengthen "the solid elements in the country, sheikhs, merchants, etc.,…by giving magisterial powers to selected notables and using them as assessors in selected cases…." By doing so, the government might still succeed in countering "the

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[28] Ibid 299.

growth of the kind of class that almost monopolises political thought in Egypt and India."[29]

What state weakness and legal pluralism made possible was a strategic transfer of judicial authority from one set of institutions to another. A stronger state, one more successful in consolidating its authority under a single set of judicial institutions, would not have been able to shift judicial power so easily. As a point of comparison, events in Egypt during this same period are instructive. During the First World War, the British responded to the rising nationalist movement by advocating for the unification of the Egyptian judiciary under a single national hierarchy. The Mixed Courts (special courts holding jurisdiction over disputes involving foreigners), which in earlier years had enjoyed some measure of British support, were now viewed as a dangerous threat to its dominance in Egypt.[30] Though the Revolution of 1919 would delay judicial unification by more than two decades, the contrast with colonial strategy in Sudan is stark. In Egypt, the best antidote to nationalism was thought to be a more centralized, legally homogenous state. In Sudan, it was the opposite.

The Ideological Origins of Native Administration

This intentional and widespread transfer of legal authority from civil to native courts was part of a much larger shift in British-held Africa toward Indirect Rule, which Lord Lugard famously popularized in his 1922 work, *The Dual Mandate in British Tropical Africa*. Lugard, who served as Governor General of Nigeria from 1914 to 1919, argued that legal authority ought to be devolved to native courts as quickly as safely possible. Not only were native courts an effective and practical tool for promoting peace and cooperation, but they also represented the colonial government's best chance of "[raising] the mass of people of Africa to a higher plane of civilization."[31] In this analysis, recognition of customary law and legal institutions was not a retreat from colonialism's grand "civilizing" mission. On the contrary, it was precisely with the

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[29] Abu Shouk 1998, 125.
[30] Brown, N. (1993). "The Precarious Life and Slow Death of the Mixed Courts of Egypt." *International Journal of Middle East Studies* 25: 40-41.
[31] Lugard, F. D. (1922). *The Dual Mandate in British Tropical Africa*. London: Blackwood, 547.

native court that "the germ of progress and evolution is to be found. This is the very 'eye' of the seed whose spontaneous and natural growth means healthy development."[32]

Lugard's protestations to the contrary, there *was* a palpable shift underway in European colonial ideologies away from the *mission civilisatrice* and toward a justification for colonial rule that did not take as its object the improvement of native populations. Beginning in the 1840s, to take just one notable example, Alexis de Tocqueville, who wrote prolifically on France's African empire, argued that French colonialism was incapable of successfully transplanting European legal and political institutions to Algeria, and that empire could only ever be justified on the grounds that it glorified the French nation.[33]

In Britain, meanwhile, the turning point seems to have been the Indian Mutiny of 1857, after which it became increasingly apparent to colonial administrators that they could no longer afford to ignore or denigrate existing legal traditions and institutions. Throughout the second half of the nineteenth century, a number of major British political theorists and jurists, including James Fitzjames Stephen, Henry Sumner Maine, and Herbert Spencer, became quite skeptical about the ability of empire to hasten the advancement of non-European societies.[34] Maine, for instance, began his career as a vocal supporter of legal codification and formalization. His disastrous experience in India in the 1860s, however, convinced him that the value of codification was *not* based on universal truth, but rather on the specific historical experience of Western Europe. Any attempt to codify Indian law, therefore, ran the risk of undermining the very legal institutions upon which the peace and profitability of the empire relied.[35] As Karuna Mantena has argued, late Victorian critiques of empire from men like Maine and Spencer

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[32] Ibid 548.
[33] Pitts, J. (2005). *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France*. Princeton: Princeton University Press, 204-239.
[34] For a discussion of these and other theorists of empire in late nineteenth-century Britain, see Bell, D. (2006). "Historical Review: Empire and International Relations in Victorian Political Thought." *The Historical Journal* 49: 281-298.
[35] Mamdani, M. (1996). *Citizen and Subject: Contemporary African and the Legacy of Late Colonialism*. Princeton: Princeton University Press; Mantena, K. (2010). *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*. Princeton: Princeton University Press; Otter, S. d. (2001). "Rewriting the Utilitarian Market: Colonial Law and Custom in mid-Nineteenth-Century British India." *The European Legacy* 6: 177-188.

were "part and parcel of the waning of moral justifications of Empire." As older justifications for colonialism faltered in the face of one spectacular failure after another, "late imperial ideologies were presented less in normative than pragmatic terms, as practical responses to and accommodations with the nature of 'native society'."[36]

As Mahmoud Mamdani has noted, Britain's failures in India cast a long shadow over all subsequent imperial ventures, and in many ways Africa provided the first real chance for colonial administrators to show how much they had learned.[37] This skepticism toward colonialism's civilizing mission was one of the major ideological impetuses for Indirect Rule and Native Administration, though more material and mundane factors were also frequently cited by colonial administrators. Harold MacMichael, for instance, who was one of the most influential officers in the Sudanese colonial regime, was hopeful that the decentralization of judicial power away from the *effendiyya* would be more efficient and yield considerable financial savings.[38] It is a strategy ably summarized in the 1921 Milner Report, which perhaps more than any other document propelled forward the cause of Native Administration in Sudan:

> Though it is absolutely necessary for the present to maintain a single supreme authority over the whole of the Sudan, it is not desirable that the government of that country should be highly centralized. Having regard to its vast extent and the varied character of its inhabitants, the administration of its different parts should be left, as far as possible, in the hands of native authorities wherever they exist, under British supervision. The existing centralized bureaucracy is wholly unsuitable for the Sudan. Decentralisation and the employment wherever possible of native agencies for the simple administrative needs of the country, in its present stage of development, would make both for economy and efficiency."[39]

The Turn Toward Native Administration

The first concrete steps toward Native Administration were taken in 1922 in anticipation of the expulsion of Egyptian personnel. The Powers of Nomad Sheikhs

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[36] Mantena, K. (2010). "The Crisis of Liberal Imperialism." *Politique, culture, societe* 11: 3.
[37] Mamdani 1996, 50.
[38] Bakhit, J. M. A. (1972). *Al-Idāra al-Barīṭāniyya wa al-Haraka al-Waṭaniyya fī al-Sūdān, 1919-1939*. Beirut: Dar al-Thaqafa, 138.
[39] Abu Shouk 1998, 126.

Ordinance,[40] promulgated in June of that year, was a direct response to the recommendations made in the Milner Report. It recognized for the first time that the *nāẓirs* and *umdas* (local leaders) of nomadic tribes ought to have authority over a wide variety of crimes and civil matters that up till then had fallen under the purview of the colonial bureaucracy. These included such serious crimes as assault, rape, and theft, as well as more capacious categories like "mischief." Officially, native courts were not empowered under the 1922 ordinance to hear homicide cases, but in practice they often did. Colonial authorities were aware of this discrepancy, but since the parties involved generally preferred to have their case settled via *dīya* (compensation, usually in cattle) instead of through a formally sanctioned trial and punishment, they tended to turn a blind eye.[41]

The Powers of Nomad Sheikhs Ordinance had an immediate effect, and by 1923, about three hundred tribal sheikhs had been authorized to exercise their judicial powers in rural northern areas. Following Stack's assassination in 1924 and a brief interregnum, Sir John Maffey was appointed Governor General (1926 – 1933) and immediately became an enthusiastic proponent of Native Administration. If properly strengthened by appropriate legislation, Maffey believed that Sudan's tribal leaders could stand as "protective glands against the septic germs [of nationalism] which will inevitably be passed on from the Khartoum of the future."[42] New rules and ordinances to that effect quickly followed, including the 1927 Powers of Sheikhs Ordinance[43] (which expanded the 1922 ordinance on nomadic tribes to include sedentary ones as well, and grouped each tribe into larger "confederations" for ease of administration), the 1928 Powers of Shaykhs Ordinance[44] (which established intertribal courts to adjudicate conflicts between tribes), and the

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[40] *SGG* no. 396, 15 June 1922.
[41] Abu Shouk, A. I. (2002). "Native Courts at Work: A Case Study from Dar Bidayriyya in the Sudan." In *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts*. C. Jones-Pauly and S. Elbern. The Hague: Kluwer Law International, 87 and 92.
[42] Minutes of meeting with Governor General, January 1, 1927, SAD 71/1/5.
[43] *SGG* no. 494, 15 August 1927.
[44] *SGG* no. 505, 15 June 1928.

Native Courts Ordinance of 1932,[45] which attempted to unify all previous ordinances under one comprehensive statute.[46]

Nor was this celebration of "primitiveness" and informality confined to judicial matters. Primary education, for instance, was increasingly conducted in informal *khalwat*, the small schools associated with Sufi orders. With the help of government subsidies, the number of *khalwat* increased from six in 1918 to 489 in 1928.[47] The content of that education changed as well, with a corresponding emphasis placed on "local history, tribal customs, tribal folklore, tales of famous tribal ancestors and explanation of current tribal policy…."[48] Interestingly, one area of education that quickly became taboo was "proper hygiene," which it was thought might prompt young Sudanese students to abandon their "traditional tribal garb" and wear Western-style clothing instead.

Not everyone in the colonial government was as enthusiastic about these developments as Maffey. Some provincial officers, particularly those in more heavily populated areas such as Kassala and Sennar, were opposed to any steps that would strengthen the tribal legal system. C.E. Lyall, governor of Kassala province from 1917 to 1921, denounced the decentralization of legal authority as "a reactionary step" that would revive "such despotic powers as were formerly exercised by the Nazirs." Others, including the governor of Khartoum province, doubted that any tribal organizations still existed that could prove useful to the colonial project.[49] These objections were taken seriously by the governor general, but were ultimately overruled. Maffey was enormously impressed with Lugard's experience in Nigeria, which seemed to him conclusive proof that Native Administration could work. He was also deeply troubled by events in India, where "vague political unrest swept over even backward people" because the British "had allowed the old forms to crumble away." If Sudan were to avoid India's

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[45] *SGG* no. 558, 15 February 1932.
[46] El Nur, M. I. (1960). "The Role of the Native Courts in the Administration of Justice in the Sudan." *Sudan Notes & Records* 41: 78-87.
[47] Qasim, A. S. (1989). *Al-Islām wa al-'Arabīyya fī al-Sūdān: Dirāsāt fī al-Haḍāra wa al-Lugha*. Beirut: Dar al-Jil, 73.
[48] Daly 1986, 381.
[49] Ibid 362.

fate, it would have to "experiment boldly with schemes of transferred administrative control, making no fetish of efficiency."[50]

By the end of Maffey's tenure in the early 1930s, however, the costs of Native Administration, in terms both of efficiency and political control, were apparent. First, as a means to dampen nationalist sentiment and reduce administrative expenses, it was a complete failure. The imposition of Native Administration robbed many urban *effendiyya* of the clear career path they felt was their due, placing instead an artificial barrier between themselves and their promotion up the bureaucratic ladder. As a result, many who might otherwise have remained politically passive were transformed into partisans of the nationalist cause. Far from reducing anti-British sentiment, Native Administration may actually have exacerbated it. Nor was it a more efficient or less expensive means of governance, as gradually became clear during the early 1930s. District Commissioners insisted that the tribal leaders under their control ought to be remunerated at a rate befitting their increased stature, and wherever tribal levies were insufficient, the government had to pay the remainder. In eastern Kordofan province alone, expenses were running E£3,500 more per year than they had before Native Administration.[51] Though their most ardent defenders would continue to insist that the native courts would save money in the long run, the rest of the government was not so convinced.

And this points to the second shortcoming of Native Administration: the artificiality of the tribe and its courts. This is not to say that tribes are not indigenous to Sudan or that *nāẓirs* and *umdas* did not traditionally carry out duties that we might now categorize as pertaining to matters of law. Rather, it is that Native Administration necessarily involved a radical transformation of what it meant to be a tribe. It turned the *nāẓir* into a warrior-king, an autocratic legislator-cum-*qāḍī* with little historical antecedent among Sudanese tribes. In his 1922 work *A History of the Arabs of Sudan*, Harold MacMichael had thoroughly debunked the myth of the monolithic tribe following a customary code dating back to time immemorial. His book was very well received by his colleagues in the colonial service, but its findings seems to have been forgotten once

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[50] Minutes of meeting with Governor General, January 1, 1927, SAD 71/1/5.
[51] Bakhit 1972, 180.

the prevailing political winds began blowing in a different direction.[52] One of the paradoxes of Native Administration, therefore, was that while it may have been intended to protect the tribes from change, it ended up transforming them more thoroughly than at any other point since the beginning of the Condominium. In the most radical cases, it even created tribes out of thin air by cobbling together various clans and "discovering" their heretofore unacknowledged unity.[53]

The force of these criticisms began to slowly dawn on the colonial government over the course of the late 1920s, with perhaps a particular emphasis on the policy's high cost. Opinion turned decidedly against Native Administration following the end of Maffey's tenure and his replacement by George Symes in 1934. Symes did not share his predecessor's enthusiasm for tribal devolution, and sought to reign in some of the authority they had been given. Still, the common scholarly practice of marking his ascension to the governor generalship as the death knell of Native Administration is somewhat of an exaggeration. The same decentralizing policy persisted into the Independence period and down to the present day, albeit under a different name. As Ja'far Bakhit puts it, the supposedly anti-tribal reforms of the late 1930s were "not the grave of native administration but the waiting room in which she finished her make-up and reappeared more lively and fascinating."[54]

To summarize, Native Administration marks a peculiar rearrangement of tactics in the history of Sudanese colonialism, one made possible by the country's lack of legal homogeneity and political unity. Many elements of early colonial rule (e.g. the centralization of authority, the education of an urban elite, the establishment of a formal bureaucracy) were either reversed or subverted under Native Administration. By transferring legal power from set of judicial institutions to another, the colonial regime hoped to slow the spread of nationalism, improve government efficiency, and strengthen the state. As a strategy, it also involved a re-prioritization of colonialism's purpose,

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[52] Daly, M. W. (1998). "Great White Chief: H.A. MacMichael and the Tribes of Kordofan." *Kordofan Invaded: Peripheral Incorporation and Social Transformation in Islamic Africa*. E. Stiansen and M. Kevane. Leiden: Brill Press, 110-111.
[53] Grandin, N. (1982). *Le Soudan Nilotique et l'Administration Britanique, 1896-1956*. Leiden: Brill Press, 124-125.
[54] Quoted in Abu Shouk 1998, 131.

placing security and good governance above the *mission civilisatrice*. More importantly, it also involved guarding against formalization and codification in a way that preserved the "illegibility" of tribal law.

III: Ali al-Tom and the Kababish Arabs

It is this notion of illegibility, only briefly discussed above, that I address in this section. Drawing on the case of Ali al-Tom of the Kababish tribe, I argue that within both the ideology and practice of Native Administration, there was a fundamental tension: the new judicial powers of the tribe were of such a nature that in order to be useful to the colonial government, they had to be exercised in a form that was fundamentally "illegible" and ambiguous. The very process whereby tribal law could be made *knowable* to the state was also a process whereby it would be rendered useless to it. British officials, therefore, were in a position in which a certain amount of ignorance was actually preferable.

In the Court of Ali al-Tom

The Kababish are a nomadic tribe located in northern Kordofan Province. Their range transects the Wadi al-Milk and stretches east from the Darfur border to about forty miles west of Khartoum. There is another branch of the Kababish near Dongola, but those located in Kordofan are by far the larger and more influential of the two. The tribe itself is of relatively recent origin. Prior to the first Egyptian invasion of Sudan in 1820, the term "Kababish" seems to have been used to apply to a loose tribal confederation and not, as became the case under the British, an organized political body. We know that some Kabbashi tribes supported the Mahdiyya, but the Nurab tribe, of which Ali al-Tom's father was the *nāẓir*, was not one of them.[55] Much of the Kababish were scattered during the violence of the Mahdiyya and the subsequent Anglo-Egyptian invasion, but most gradually returned in the early years of the Condominium. On the whole, it does not seem as if the British were especially interested in Ali al-Tom or his tribesmen during that first decade of colonial rule, so long as taxes were paid and the peace was kept.

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[55] Upon the consolidation of the Kababish into one tribe, the Nurab was re-termed a "clan".

Economic and political reconstruction along the Nile clearly took precedence.[56] Meanwhile, inter-tribal violence and camel raids were not uncommon, as old scores were settled and a new hierarchy was established.[57]

This policy of relative neglect, however, was to change dramatically following the outbreak of the First World War. The Sultanate of Darfur sided with the Ottomans, prompting a British invasion of the region in 1916. Once Darfur was conquered, the Kababish found themselves no longer on the periphery of the colonial state, but in its heartland. Their sporadic forays and raids into Darfur – tolerated and even encouraged by the British when it was a foreign power[58] – suddenly became unacceptable.[59] It was a matter of grave importance, therefore, that clear lines of communication between Ali al-Tom and the government in Khartoum be established. The founding of a government outpost in the nearby town of Soderi and the issuing of the 1914 Herd Tax Ordinance should be understood as a reflection of the growing interest that the colonial administration was developing in Ali al-Tom and his tribe.[60] In 1915, al-Tom was recognized by the British as *nāẓir 'umum* of all the Kababish, and all the other nearby tribes, including the Kawahla, Hawawir, and Dar Hamid, were forced to acknowledge his primacy.[61]

Reading colonial accounts of the Kababish, what immediately becomes apparent is the overwhelming force of Ali al-Tom's personality. No British inspector or district commissioner seems to have come into contact with al-Tom and failed to be impressed. Reginald Davies, inspector of the Kababish in the 1910s and himself a major proponent of Native Administration, remembers the *nāẓir* this way:

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[56] The best analysis of the Kababish remains Asad, T. (1970). *The Kababish Arabs: Power Authority and Consent in a Nomadic Tribe*. London: C. Hurst & Company, from which much of what follows is drawn.
[57] Beck, K. (1996). "Nomads of Northern Kordofan and the State: From Violence to Pacification." *Nomadic Peoples* 38: 77.
[58] MacMichael's intelligence report to Wingate, June 1, 1916, SAD 129/1/32.
[59] Beck, K. (2003). "Das vorläufige Ende der Razzien: Nomadisches Grenzkriegertum und staatliche Ordnung im Sudan." *Militär und Staatlichkeit. Beiträge des Kolloquiums am 29. und 30.04.2002*. I. Schneider. Halle, 141-142.
[60] Grandin 1982, 288.
[61] Lea, C. A. E. (1994). *On Trek in Kordofan: The Diaries of a British District Officer in the Sudan: 1931-1933*. Oxford: Oxford University Press, 5.

> The autocrat who controlled the Kababish was Sheikh Ali el Tom, a most remarkable man. In appearance he was very handsome, almost black in colour but with pure Arab features. His personality was forceful, but he had great charm added to the perfect courtesy of the best of his race. He was unlettered, but his intelligence was acute….[Though] his people held him in awe they had a pride in him which could be heard in their voices when they were asked, among strangers, of what tribe they were and answered simply, 'Sheikh Ali's people' or 'People of El Tom's son'.[62]

Davies's admiration for Ali al-Tom seems to have been echoed further up the bureaucratic ladder. Known in his day as "the *parfait, gentil* knight",[63] al-Tom and his family personified "all that is best in the Arab tradition" and were "far less affected or degraded by local African influences than [was the case in] most other and less fortunate tribes."[64] He was a member of the 1919 Sudanese delegation sent to London to congratulate the king upon his victory over the Central Powers, and in 1925, was made a Knight of the British Empire – one of only three Sudanese to be so honored during the Condominium.[65] By the time of his death in 1937, he was widely acknowledged as the single most important tribal leader in the country.

It should be noted that al-Tom was keenly aware of the impression he made on British officers, and worked hard to cultivate the reputation of an Arab sheikh out of the pages of T.E. Lawrence. District commissioners on trek in Kordofan were inevitably welcomed with wild displays of horsemanship and archery, and feted afterwards with drink and dance. E.G. Sarsfield-Hall, governor of Kordofan province, described in his diary how, upon his arrival in Dar al-Kababish in 1923, he was swept up in flux of men on horseback "galloping about brandishing their whips and bucking their horses."[66] Later visitors were treated to similar performances, after which al-Tom would emerge in

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[62] Davies, R. (1957). *The Camel's Back: Service in the Rural Sudan*. London: John Murray, 59-60.
[63] This appellation is from Peter Hogg, an assistant district commissioner for Kordofan. See P. Hogg, "Memoir of Soderi," 1936, SAD 815/11/11.
[64] De Bunsen, "handing-over notes," 1936, SAD G//S 1204 file 6, 2-3.
[65] The other two were Abd al-Rahman of the Ansar and Ali al-Mirghani of the Khatmiyya Sufi orders.
[66] Sarsfield-Hall, "Diary of a Trip in Northern Kordofan," 1923, SAD 680/8/4-5.

special robes for photographs and sporting events.[67] These were highly choreographed affairs, and Al-Tom was careful to limit exactly what visitors to his camp were allowed to see or with whom they were permitted to speak – as one assistant district commissioner discovered when he was caught walking about unattended. Al-Tom, he writes, "blew me up" and forced him to promise "faithfully not to go out without someone following, albeit at a discreet distance."[68] Clearly, al-Tom was aware of the affect he had on impressionable young British officers, and of the advantage he would garner if he could preserve his reputation as a proud Arab sheikh.

"Native life is not framed on logical lines only"

One might think, given his enormous influence in north Sudanese political and economic life, that the regularization of Ali al-Tom's powers or his transformation into a legal subject would be a priority for the British, and in a way, it was. The Herd Tax Ordinance mentioned above, for instance, was an early attempt by the colonial government to bring some clarity to bear on al-Tom's finances. But taken as a whole, the record is far more ambiguous. Powerful forces within the British administration discouraged many attempts to formalize al-Tom's authority or to define the contours of his tribe. Contrary to James Scott, for example, we do not see an urban-centric state eager to transform a nomadic tribe into a more tractable, more productive sedentary one.[69] On the contrary, settling down is precisely what al-Tom was encouraged *not* to do, as Douglas Newbold, governor of Kordofan, explained to the sheikh in 1935. "Are we right to remain nomads?" al-Tom wondered. "Our country produces nothing and we live on our camels." Newbold replied, "Yes, you are living true to your environment, to economic laws, and to your social organization."[70]

A similar conversation took place one year earlier, this time with C.A.E. Lea, who was then a district officer in northern Kordofan:

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[67] Willis, J. (2011). "Tribal Gatherings: Colonial Spectacle, Native Administration and Local Government in Condominium Sudan." *Past and Present* 211: 243-268.
[68] P. Hogg, "Memoir of Soderi," 1936, SAD 815/11/17.
[69] Scott, J. (2009). *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*. New Haven: Yale University Press.
[70] Henderson, K. D. D. (1953). *The Making of the Modern Sudan: The Life and Letters of Sir Douglas Newbold, K.B.E. of the Sudan Political Service*. London: Faber and Faber Limited, 70.

> [Shaikh] Ali asked whether, under the proposed Native Administration, he would have to write down and treat as "cases" all the various small offences which he at present deals with merely by imposing some "slavish" task on the guilty party, such as drawing water or hewing wood. Mr Lea replied that the Government wanted nothing better than to leave the Kababish to be dealt with according to their customary justice so long as crime was kept down and the tribe remained contented.[71]

It is important not to overstate the case. It would be a mistake to conclude that the British were not interested at all in regularizing Ali al-Tom's rule – on the contrary, it was a topic of enormous concern for them. As Native Administration fell out of favor in the 1930s, the government re-doubled its efforts to incorporate al-Tom into the predictable, formalized legal system it had already successfully established among other tribes. And Lea and Newbold would lead the charge in this endeavor, patiently explaining again and again the supposed benefits al-Tom would accrue if he would but consent to regularize his power. What must be made clear, however, is that there was nothing inevitable or uncontroversial about folding Ali al-Tom into the standardized Sudanese judicial system. A review of the colonial records reveals repeated instances in which British officials scrambled to preserve a sense of ambiguity and unpredictability among the Kababish, even to the detriment of their own government's knowledge.[72]

From the point of view of the British, what was at stake here was nothing less than whether the Kababish would continue to be the effective and loyal bulwark against nationalism it always had been, or become instead just another quarrelsome tribe unable

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[71] Willis, J. (2005). "*Hukm*: The Creolization of Authority in Condominium Sudan." *Journal of African History* 46: 40.

[72] Reginald Davies, for instance, recommended in a 1915 memo to Wingate that al-Tom's punitive powers be exempted from regularization, even though the powers of neighboring tribes in Northern Kordofan had already been formalized. It was his opinion that "a general principle of future policy should be to uphold the authority of the Nāẓir as much as possible," regardless of the inconsistencies it created. In the margins of the memo, Wingate has highlighted this section and written "Yes" next to it. R. Davies, "Policy in Dar Kababish", 1915, SAD 627/1/9. Similarly, de Bunsen argued that al-Tom's main court should be "left without undue interference except in improving the entering of cases and the paying-in of fines," but that even here, "as long as justice is dispensed the first is not an intrinsically important matter, except in so far as it is a means of educating the personnel." De Bunsen, "handing-over notes," 1936, SAD G//S 1204 file 6, 5.

to manage its own internal affairs. It points to a powerful contradiction within the principles of Native Administration, one that is perhaps nowhere better illustrated than in the case of Ali al-Tom. On the one hand, the colonial government was eager to "regularize" the authority of the *nāẓirs* and *umdas*, something it sought to accomplish by establishing the native court as a discrete institution with formal personnel. The powers that were being devolved to them were far too great to leave entirely in their hands. It was of the utmost necessity, therefore, that tribal rulers be limited in what sorts of crimes they could hear or the fines they could levy. On the other hand, there was a pervasive fear within the government that excessive formalization of the tribes would destroy them, or at the very least rob them of the very qualities of independence and flexibility that made them so resistant to nationalism. Customary law was considered valuable to the British precisely because it was not written down, and therefore was perfectly suited to respond to whatever challenges a changing Sudan might throw at it. One colonial officer put it thusly:

> The amalgamation of small tribes with larger ones, the forming of large tribes into confederations, the regularisation of customs by legal sanction all appeal to the tidy-minded administrator but native life is not framed on logical lines only, and by excessive formalisation the spirit of local custom may be sacrificed to the letter of administrative tidiness and the checks and balances of native life destroyed.[73]

This is not the language of a weak state coerced by circumstance into recognizing the authority of tribal elites. Rather, it is the outcome of an intentional policy that had as its objective the preservation and promotion of legal informality, even when doing so came at the expense of overall colonial knowledge. One colonial administrator framed the dilemma succinctly: "The more the government knew of a tribe's internal workings, the less successful its administration seemed to be."[74] If we take this analysis seriously, a solution immediately presents itself. By holding in abeyance the standardizing,

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[73] Hamilton, J. A. d. C., Ed. (1935). *The Anglo-Egyptian Sudan from Within*. London: Faber and Faber Limited, 134.
[74] Lea 1994, 5.

formalizing influence of state law, a zone of incommensurability was created that made meaningful social control possible.

IV: The Mechanics of Strategic Ambiguity

In order to make sense of strategic ambiguity and the regime-judiciary relationship in Sudan, let us take a step back for a moment and turn to another case of legal reform, this one some eight hundred miles north and seventy years previous to the one described above. As Timothy Mitchell relates, during the 1850s and 1860s, as the Egyptian government fell deeper into debt to its European creditors, efforts were made by the state to introduce some notion of private property into Egyptian law.[75] To do so, the government attempted to *sell* public land into the hands of wealthy officials, with the hope of using the profits to pay back its creditors. Unfortunately, most Egyptians proved to have little appetite for becoming property owners, which would have required a major upfront cost and little guarantee of long-term profitability. In order to reassure them, therefore, the government agreed to grant these prospective landowners enormous discretionary authority over all people, animals, and things within their private estates. The state would still concern itself with monitoring and controlling relations between estate owners, but within their own given parcels of land, Mitchell tells us, each estate owner was an "absolute master…accountable to no one. He could imprison, expel, starve, exploit, and exercise many other forms of arbitrary, exceptional, and, if necessary, violent powers."[76]

It is unclear whether the juridical independence of the estate owner, and the legal helplessness of tenant farmers, ever rose to the extremes that Mitchell seems to suggest. Yet this account of legal exceptionality is nevertheless remarkable because it happened within and as a result of a nation-wide project to standardize, formalize, and codify law. At the macro level, the story of private property in Egypt unfolds as a classic tale of legal regularization. Farmers, who historically could move about as they pleased and grow what they liked, were suddenly confined to a particular estate where a powerful

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[75] This account is drawn from Mitchell, T. (2002). *Rule of Experts: Egypt, Techno-Politics, Modernity*. Berkeley: University of California Press, 54-79.
[76] Ibid 70.

landowner would determine precisely when and where a given crop would be planted. The state, meanwhile, enjoyed a steady and predictable income each year from the landowners, who were each responsible for delivering to the royal coffers a predetermined annuity. From the outside, each estate appeared regular and well ordered.

But within the estate, things looked significantly different. Cadastral maps of Egypt now showed each estate as a carefully measured and defined square of property, and anyone who consulted those maps would instantly know its size, location, population, and average productivity. But what went on *inside* those estates was, to the government in Cairo, essentially a mystery. Thus, the establishment of a codified and standardized system of property law "went hand in hand with a legal architecture that constructed territories of arbitrary power within the larger space of legal reason and abstraction."[77] And since the landowners now enjoyed new powers of punishment and reward that had till then been strictly the reserve of the sovereign, legal ambiguity was in many ways actually enhanced.

What this glimpse into Egyptian property law reveals is that legal ambiguity is not incompatible with legibility, just as lawlessness and disorder are not incompatible with – and indeed, may well be inseparable from – law and order.[78] Rather than conceptualize the imposition of state law over a plural legal system as a "descending grid" consisting of clear and formal rules,[79] I have argued in this chapter for a model of legal hegemony in which the state disguises, transmutes, and rearranges ambiguity in politically useful ways. Under some circumstances, a legally homogenous and institutionally unified judiciary may make sense for a state. Under other circumstances, it may not. One of the ways that the state sustains its rule, therefore, is through is its ability to establish the authoritative discourse concerning when and where ambiguity is acceptable – to distinguish personal discretion from an abuse of power, or straightforward interpretation from improper judicial activism.

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[77] Ibid 57.
[78] Comaroff and Comaroff 2006; Das, V. and D. Poole, Eds. (2004). *Anthropology in the Margins of the State*. Santa Fe: School of American Research Press.
[79] Thompson, E. P. (1975). *Whigs and Hunters: The Origin of the Black Act*. New York: Pantheon Books.

Returning once more to the case of Native Administration and Ali al-Tom, there seems to have been two assumptions at work that justified the tribe as an acceptable repository of juridical ambiguity. First, the leadership of the SPS perceived the tribe (incorrectly, it should be noted) as a bounded jurisdiction with a limited and definable membership. Second, because it was both "natural" and autochthonic, the tribe was thought to be stable and self-regulating, subject to its own internal rhythms and patterns – specifically, a so-called "tribal discipline" that held at bay the zeal of nationalism. To be sure, there remained some within the colonial administration for whom the tribes remained objects of disgust and contempt, but many others saw in them and their leaders the "real Sudan" not yet spoiled by the decadent, corrupt *effendiyya*.[80] Because the tribes were natural, they could be trusted to proceed according to their own internal logics.

The function of the colonial government, therefore, was to preserve that natural state against the infiltration of the "outside world." So long as Ali al-Tom was living and his tribe remained isolated, it was hoped that the Kababish would continue to function along their natural lines. The great fear for the British, therefore, was that members of the Kababish might come into contact with the outside world and grow "sophisticated."[81] For the moment, the British were content to look the other way whenever al-Tom used his native courts in ways that were, technically, illegal. But if his followers were to ever grow sophisticated, one district officer warned, "they will become vocal and not mutely submissive to irregularities and illegalities in [al-Tom's] patriarchal autocratic system of administering his tribe."[82] And if that were to happen, what once was natural and self-sustaining would quickly fall into chaos.[83]

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[80] Bakhit 1972, 138.

[81] This sentiment is expressed well in an official colonial pamphlet on Sudanese tribes: "An intensive system of direct Governmental control in the case of nomads has indeed singularly little to recommend it. Remarkable qualities of insight, sympathy, imagination, firmness, patience and knowledge are needed in the senior staff to make it successful, and a large junior staff is unavoidable if records are to be kept. But, on the other hand, the nomad is the more contented in proportion as he is left without alien interference, and no foreigner has the knowledge and insight, and few the patience and power of restraint which a good Sheikh possesses." Government of Sudan. (1921). *Memorandum on General Administrative Policy*. Khartoum: The Sudan Printing Press, 6.

[82] Lea 1994, 276.

[83] In fact, this sort of corruption works both ways. Not only is legal formality bad for the tribe, but the tribe is bad for the formal legal system, as Newbold describes in vivid terms in a 1926

Before legal ambiguity becomes acceptable, therefore, it seems it must satisfy two provisions. First, it must prove itself to be limited to a specific jurisdiction, like a tribe or an agricultural estate. This will prevent the illegibility of its law from spilling into other, less well-suited jurisdictions. Second, there must be some internal process, natural to the jurisdiction, which will temper or focus the judicial powers wielded therein. In the absence of direct observation and discipline, this internal process will be necessary to keep local rulers from acting against the best interests of the state. Once these two provisions are met, ambiguity can be safely deployed.

One of the implications of these findings is that we must be more skeptical in declaring the persistence of informal institutions as evidence of *resistance* to the state. The example of Ali al-Tom shows that the British administration actively encouraged the development of native courts, even when doing so detracted from the coherence of the central bureaucracy. The continued existence of native courts may read to us now as evidence of their resistance to the state, but that is only because we have assumed that the teleology of the state has been one of unwavering monopolization of legal authority. My analysis of Native Administration in Sudan shows that the colonial government can be as much a proponent of ambiguity and informality as clarity or institutionalization.

A second important implication of this argument has to do with the way scholars of judicial politics understand the role of law in weak authoritarian states. Fragmented judicial authority is typically presented in the literature as an impediment to state sovereignty and strength, while state strength associated with well-defined jurisdictions,

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book review. All Arabs are litigious by nature, Newbold tells us, but "nomadic" Arabs exhibit a skill in manipulating formal legal procedures that sedentary Arabs were unable to match: "The sedentary Arab has neither the leisure nor the patience nor the tribal tenacity of the nomad, and, like an untrained hound, flings from scent to scent, and often bays aloud before he finds the proper trail. Though more vociferous he is easier to outwit." By contrast, the nomad "sits amid his browsing herds under the wheeling stars and even if gifted, as often, with but Boeotian wits, manages to produce the most labyrinthine complications in the simplest case, and having done so rides off to confront the perspiring administrative officer with an oafish smile on his face, clutching his misleading petition in one clammy hand and crumbling a piece of irrelevant camel-dung in the other." Newbold, D. (1926). "Review of Austin Kennett." *Sudan Notes & Records* 9: 141.

clear hierarchies of appeal, and the formal articulation of law and procedure.[84] The findings of this chapter suggest otherwise. By carefully empowering one set of judicial institutions and marginalizing another, weak states can make legal pluralism work in its favor. And by purposely discouraging the judiciary from adopting a formal set of rules and procedures, it can then deploy it during moments of great national crisis, when creativity and flexibility are more important even than the state's own command of the law.

V. Conclusion

During the first two decades of British colonial rule, the Sudanese judiciary developed in a way that would not have seemed out of place within a much stronger state: national courts were established, trained legal personnel were appointed to key posts, and carefully worded laws were published in an official gazette. However, when the emerging nationalist movement and the 1924 uprising presented the colonial state faced its first real crisis, it was not to the national judiciary that the regime turned. Instead, it was to an informal and deeply fragmented collection of native courts, which were promptly invested with a vast new array of judicial privileges and immunities. This sort of rapid shift in the distribution of judicial power was only possible because of the colonial state's own lack of legal homogeneity. And the added decision by the regime to frustrate any attempt at codification or standardization was also a strategy that could only have been carried out in a legal environment already well accustomed to pluralism, informality, and ambiguity. For much of the first three decades of colonial rule, therefore, regime-judiciary relations were remarkably uneven and pluralistic, with some areas of subject to intense state scrutiny and regulation, and others to which the state seemed to intentionally avert its gaze.

Of course, Native Administration does not represent the totality of judicial politics in colonial Sudan, nor was it ultimately successful in stemming the popularity of nationalism. In the next chapter, I examine developments in the civil judiciary, which

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[84] Berman, H. (1983). *Law and Revolution: The Formation of the Western Legal Tradition.* Cambridge: Harvard University Press; Spruyt, H. (1994). *The Sovereign State and Its Competitors: An Analysis of Systems Change*. Princeton: Princeton University Press.

emerged rapidly in the 1940s and 1950s as an enormously powerful state institution. Interestingly, this was also a period in which the notion of judicial independence, as both normative commitment and institutional arrangement, first entered into colonial Sudanese discourse. This development would go on to have an enormous impact on the nature of regime-judiciary relations in the post-colonial era, as well as for the way that Sudanese conceptualized the nature of law.

CHAPTER THREE: THE POLITICS OF JUDICIAL INDEPENDENCE, 1945-1956

Introduction

Between 1945 and 1956, the concept of "judicial independence" (*istiqlāl al-qaḍā'*) emerged for the first time as a dominant element in Sudanese legal discourse. Within both the judiciary and the colonial government's executive departments, the importance of judicial independence became a recurring motif in regime rhetoric. Something similar developed among Sudanese nationalists, where the call for judicial independence became incorporated into the movement's larger set of political demands. Considering the authoritarian nature of the British colonial regime, what could something like judicial independence possibly mean? What sort of work did it perform? And why was the discourse of judicial independence embraced by such a wide range of actors and institutions, including by those who would seemingly have the most to lose by its realization?

As both discourse and a set of institutional arrangements, judicial independence brings to the fore a number of important trends in the history of the Sudanese legal system.[1] The years following the Second World War saw the rapid professionalization of the judiciary and a sharp increase in judicial capacity.[2] Many of the basic structures that characterized the post-colonial judiciary, including the criminal appellate system, the juridical supremacy of the Chief Justice, and the incorporation of Native courts into the judicial branch, were all established during this period of rapid reform. The total volume of cases heard in Sudan recovered from its pre-war slump, and many new court facilities were added across the country, including a Southern Circuit on the High Court in 1951.[3]

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[1] Unless otherwise indicated, the terms "legal system" and "judiciary" in this chapter refer to the secular, civil judicial institutions in Sudan that implemented the common law. Special note will be made when either the "tribal" or *shari'a* legal systems are being discussed.

[2] By professionalization, I am referring to a number of developments within the judiciary, including the routinization of judicial procedure, the establishment of a common code of behavior and conduct, the clarification of institutional duties, and an emergent *esprit de corps*.

[3] An eyewitness account of these reforms, which will be discussed in greater detail below, can be found in Hawley, D. (1991). "Law in the Sudan under the Anglo-Egyptian Condominium." In

These years also saw the development of the repertoire of tactics that would, during Sudan's first decade of independence, enable it to fend off political interference from regimes both democratic and authoritarian.[4] And in all instances and with each reform, the concept of judicial independence was a crucial mediator: as justification, as grounds for critique, and as the terms under which meaningful negotiation and debate could be possible.

Considering the fundamental authoritarianism of colonial Sudan, how can we account for the power of judicial independence, or its popularity among so many actors? In this chapter, I argue that the concept of judicial independence functioned as a strategy for defining the limits of acceptable politics. To declare an office, action, or discourse as "legal" in nature was to de-politicize it, and thus served to place it outside of the sphere of public contestation. As such, it was a potent tool of colonial domination, capable of deflecting, negating, amplifying, and concealing political power. Furthermore, I argue that the principle of judicial independence did not emerge in Sudan in order to safeguard or promote the distinction between law and politics – on the contrary, it was precisely this discourse of judicial independence that *produced* the distinction in the first place. That is, the language of judicial independence established the notion of law and politics as autonomous spheres, and not the other way round.

In making this argument, I am breaking with the view, common within much of the political science literature, which holds that when autocrats choose to promote independent judiciaries, they do so in order to resolve certain "pathologies" of

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The Condominium Remembered: Proceedings of the Durham Sudan Historical Conference, 1982. D. Lavin. University of Durham, Centre for Middle Eastern and Islamic Studies, Durham. I: 45-46. On file at the Sudan Archive, Durham.

[4] This was true during times of both democracy under Abdullah Khalil and Sadiq al-Mahdi, and authoritarianism under Ismail 'Abboud. To mention just a few highlights of those years of judicial power, one would note: the establishment of judicial review, first in 1956 in the case of *Mohammad Adlan v. The Government of Sudan*, and then again in 1958 in *The Building Authority of Khartoum v. Evangellos Evangellides*. Later, from 1961 to 1964, which is to say during the height of government repression under General Abboud, the High Court ruled against the regime in seven of the eight most high profile cases involving police powers and detainee rights. And perhaps most famously, in 1966 the High Court overturned the parliamentary ban of the Sudanese Communist Party, a decision that temporarily threw the Sudanese political scene into chaos, and ultimately resulted in a showdown that led Babiker Awadallah, then Chief Justice of the High Court, to resign in protest.

authoritarian rule. For instance, a ruler might promote an independent judiciary in order to reassure foreign investors that they can safely do business in his country,[5] to win popular support and legitimacy,[6] or to ensure that the rights and policies of regime elites will be protected in the event of their overthrow.[7] For these scholars, the central problem in need of explaining has to do with the delegation of power: that is, why would an authoritarian regime, typically associated with the concentration of authority in the executive branch, permit or encourage the development of an independent and empowered judiciary? Framed in this way, the question presupposes that the distinction between the executive and judicial branches is both obvious and unproblematic. Only the distribution of power need be investigated, not the distinction itself or the role of judicial independence in constructing it.

This approach is deployed to excellent effect in one recent account of the Sudanese judiciary. In *Law's Fragile State*, Mark Fathi Massoud identifies three reasons why the colonial government promoted independent judicial institutions. First, the regime believed that a court system widely perceived as independent would be more attractive to Sudanese litigants, who might otherwise take their disputes to non-state judicial institutions.[8] Second, the colonial government hoped that the existence of an independent judiciary would bolster the legitimacy of its rule, particularly at a time of growing concern over the popularity of nationalist and pro-Egyptian movements.[9] And third, it was thought that by insulating judges from political interference, the judicial structure put in place by the British (in particular its use of common law) would be more likely to survive the end of colonial rule and withstand Egyptian influence.[10] This valorization of judicial independence, Massoud goes on to argue, was soon taken up by

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[5] Moustafa, T. (2007). *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge: Cambridge University Press.
[6] Landry, P. (2008). "The Institutional Diffusion of Courts in China: Evidence from Survey Data." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*. T. Ginsburg and T. Moustafa. Cambridge: Cambridge University Press.
[7] Ramseyer, J. M. (1994). "The Puzzling (In)Dependence of the Courts: A Comparative Approach." *The Journal of Legal Studies* 23(2): 721-747.
[8] Massoud, M. F. (2013). *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge: Cambridge University Press, 63-64.
[9] Ibid 53-58.
[10] Ibid 89.

Sudanese actors themselves in their own struggle against the colonial regime.[11] As a result, it quickly achieved widespread popularity across the national spectrum.

While I do not disagree with any of these conclusions, I do want to argue that they are incomplete. Specifically, they overlook the role of judicial independence, as both normative discourse and institutional arrangement, in concealing or countering the deployment of political power. Precisely because an independent judiciary presupposes the clear and unproblematic distinction between law and politics, it can be a powerful tool for stifling political activism, depoliticizing controversial policies, and redirecting public attention. Its use, moreover, is not limited to the regime, and can be effectively deployed by non-state actors or even by various factions within the regime in intra-state struggles.

My approach in this chapter is as follows. In Section One, I situate my analysis of judicial independence in the larger context of post-war Sudanese politics. This period, from 1945 until the evacuation of the British in 1956, marks some of the most tumultuous and consequential events in modern Sudanese history, but few scholars have viewed these years through the lens of judicial reform. I show how the impact of the Second World War, as well as the reemergence of the nationalist movement, prompted a series of important changes in the structure and ideology of the judiciary. In Section Two, I concentrate on the career of judicial independence, as both discourse and institutional arrangement, in light of those changes. I argue that the valorization of judicial independence, whether by, within, or against the colonial state, frequently served as an alibi for the strategic management of politics. This, in turn, led to important changes in the way law and the judiciary were conceptualized within the larger context of the colonial state, a dynamic I examine in Section Three through the dramatic events of the 1954 state of emergency. Finally, I conclude by showing how this strategy of reification – of the formal construction of law and politics as distinct and autonomous spheres – relates to the strategy of ambiguity and informality discussed in the previous chapter.

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[11] Ibid 76.

I. The Professionalization of the Judiciary

This section focuses on the rapid transformation of judicial power following the Second World War. While many important developments in the judiciary precede this period (including the policy of Native Administration described in Chapter Two), the reforms after 1945 stand apart for their ambition, impact, and durability – in most cases, persisting well into the post-colonial era. As historian Frederick Cooper has noted, the colonial states of this period represent colonialism "at its most intrusively ambitious."[12] Even as their strategies of political control began (or in some cases continued) to founder against newly resurgent nationalist movements, Africa's colonial regimes actually accelerated the process of institutional development. In Sudan, legal reform was a key component of that process, leading to the construction of a much more powerful, internally coherent, and professionalized judiciary than had existed up till this point.

Reforming the Judicial Infrastructure

One of the most immediate effects of the Second World War was to generate enormous demand within the colonial government for a new range of judicial technologies and capacities. During the war itself, the government's main focus was on security, prompting it to declare a countrywide state of emergency in 1939. Under the terms of the Defence of the Sudan Ordinance, which was the instrument of this and most subsequent states of emergency in Sudan, the government's judicial organs were given new powers of investigation, detention, and trial.[13] Under the Governor General's authority, the judiciary was permitted to convene courts-martial (Section 4:1a), ignore or revise the Penal Code and Code of Criminal Procedure (Section 4:1b and Section 11), and shift the burden of proof from plaintiff to defendant (Section 14).

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[12] Cooper, F. (2002). *Africa Since 1940: The Past of the Present*. Cambridge: Cambridge University Press, 4.

[13] The Defence of the Sudan Ordinance was cited as the authorizing document of the 1954 state of emergency, as well as that of President Ja'far Numayri in 1984. The majority of the ordinance is given over to describing the conditions under which the government may seize private property and the terms under which it must compensate the owners, important issues during the Second World War. In comparison, the passages on judicial powers are few and relatively short, though no less sweeping for their brevity.

For the most part, these powers were directed toward stemming the flow of illegal or illicit goods through the country. As with elsewhere in Africa[14], the colonial regime in Sudan was not eager to relinquish the economic controls and state monopolies it had established during the war. Moreover, much of the countryside was awash with weapons, especially in the east where a retreating Italian army had left behind rifles and hand grenades.[15] In the cities, there was a more general problem with hoarding, price gouging, and the smuggling of military supplies out of the country. Inter-regional crime proved to be an especially thorny issue as well, one that a lack of coordination between provincial police forces made difficult to address.[16]

In fact, lack of coordination and administrative inefficiency emerged as significant problems in nearly all parts of the legal system during this period. The stresses of war had revealed a number of weaknesses within inter-departmental communication, resulting in growing administrative delays amidst a rising crime rate. In the Three Towns, for instance, each town (Khartoum, Khartoum North, and Omdurman) had its own criminal court system with its own method of issuing summons, arraigning suspects, and administering punishments. Police officers, meanwhile, displayed little knowledge of the law they were charged with enforcing, and frequently supplied magistrates with inferior or incomplete evidence. As a result, at a time when the number of criminal and civil cases being heard by the courts was historically low, the case backlog – particularly in Khartoum – was disturbingly high.[17]

Many attempts were made to solve these problems, beginning with adding new employees to the Legal Department (Figure 2.1). While the department had been slowly adding new staff throughout the war, it was only after its conclusion that expansion began in earnest. For the period of 1935-1944, the Legal Department averaged just twenty-six

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[14] Young, C. (1994). *The African Colonial State in Comparative Perspective*. New Haven: Yale University Press, 185.
[15] Unpublished memoir of William McDowall, ADC of Kassala from 1939 to 1943, and High Court Judge (Southern circuit) from 1951 to 1955, SAD 815/8/14.
[16] Berridge, W. (2011). "Under the Shadow of the Regime: The Contradictions of Policing in Sudan, c. 1924-1989." (PhD diss., Durham University), 72.
[17] For a description of administrative failures in the Three Towns, see Kevin Hayes to High Court Judge W. O'B. Lindsay (Khartoum), August 18, 1944. SAD 959/12/8-12. For figures on the criminal and civil caseload during the war, see Massoud 2013, 77, Figure 2.4.

personnel, whereas it ballooned to an average of fifty-four during the period of 1945-1954. Institutional expansion occurred as well. In 1949, a Court of Criminal Appeal was established through the efforts of the Legal Secretary Cecil Cumings, hearing its first case the following year. Prior to that point, no criminal appeal was possible beyond a Major Court, creating a patchwork of criminal precedents among the various jurisdictions. The court only met around sixteen times between 1949 and 1956 (it could only hear cases specifically referred to it by the Chief Justice), but it was hoped that through the process of appeal, a sounder and more consistent body of criminal precedent would be developed. To aid the court in this project, its first eleven decisions were compiled and published. Prior to this point, surprisingly little effort was made to keep a record of the judiciary's decisions.[18] The *Digest of the Decisions of the Court of Appeal of the Sudan* had been published in 1926, containing a condensed version of around eighty civil cases from the previous decade, but no further efforts were made until 1954.[19] The Chief Justice, meanwhile, issued a number of circulars designed to enforce a common method of conducting trials and composing decisions.[20] It is no exaggeration, therefore, to state that in the years immediately following the Second World War, the judiciary raced to coordinate and standardize the sort of justice it dispensed.

At the same time, many judges began to resent their position in the colonial government, which they felt did not sufficiently reflect their skill or professionalism. For instance, at war's end, the Code of Criminal Procedure still required judges to receive confirmation from an executive officer (e.g. a governor or district commissioner) for any judgment delivered by a Major Court. This requirement, according to one High Court judge, may have made sense in the Condominium's early years when most colonial

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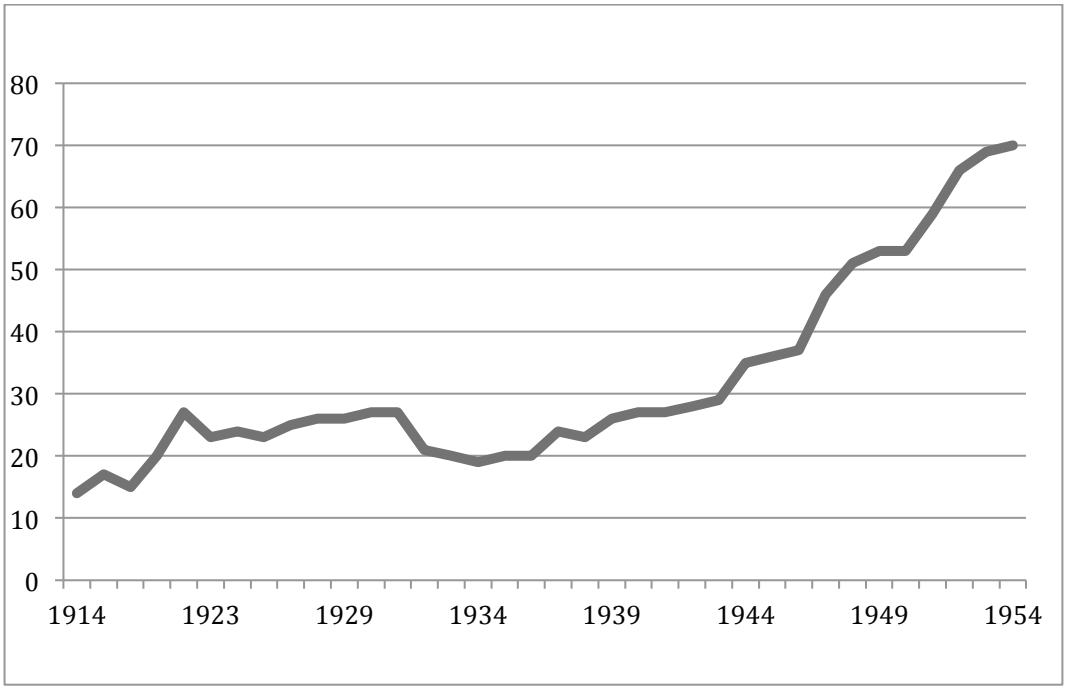
[18] Indeed, written decisions were held in so little regard that with the exception of the civil Court of Appeal and some land title decisions, all rulings written by the High Court were destroyed after a period of fifteen years, on the grounds that they contained little of importance. Considering the fact that the government was attempting to establish Sudan as a common law country, this is a baffling position.

[19] For more on the early years of law reporting in Sudan, see Guttman, E. (1956). "Law Reporting in the Sudan." *The International and Comparative Law Quarterly* 6(4); Twining, W. L. (1959). "Law Reporting in Sudan." *Journal of African Law* 3(3).

[20] See for example Chief Justice Cecil Cumings on the handling of large fatal affray cases, July 21, 1946. HAW 1/3/18-21 (SAD); and on the proper procedure for trying a generic criminal case, January 12, 1947. HAW 1/5/15-19 (SAD).

judges were laymen or half-educated amateurs, but such was no longer the case. Not only was such an arrangement inefficient and a source of frustration to the under-appreciated jurist, but it also "lessen[ed] the dignity of the Courts in the eyes of the public by giving the impression that their judgements are merely provisional."[21] If the rule of law was to be preserved, therefore, it was imperative that judges and magistrates be granted the authority and autonomy commensurate with their professionalism.

Figure 2.1: Number of Legal Department Personnel, 1914-1954



Source: *Quarterly Staff List of the Sudan Government*, 1914-1954
Note that these numbers do not include *qāḍīs* employed in the *shari'a* courts.

Indeed, the protection of professional dignity became an important component of judicial reform in this period. In February 1953, for instance, judges and advocates of the civil judiciary adopted robes and wigs for the first time, with rank denoted by the colored sash worn over the robe.[22] Judges were present at most major ceremonies and public events, often in positions designed to highlight their indispensability to the functioning of

[21] Kevin Hayes, "Criminal: Appeal and Confirmation under the New Constitution." April 30th, 1953. SAD 965/2/53.
[22] Hawley, D. (1959). "Judges' Robes in the Sudan." *Sudan Law Journal & Reports* 4: 211-214.

the colony. And among advocates, the Sudan Bar Association, which had been active since the 1930s, took on newfound energy following the admittance of Sudanese lawyers into its ranks.

The Challenge of Nationalism

Thus throughout the war years and immediately thereafter, there was already a widespread interest within the colonial government in reorganizing Sudan's judicial infrastructure, with a particular eye toward formalizing procedures, coordinating duties, and expanding judicial capacity. It was the resurgence of Sudan's nationalist movement, however, that proved decisive in propelling forward long-lasting judicial reform. Of course, the demand for national independence was present throughout the war. The Graduates' Congress, an early and vocal advocate for self-determination, was formed in 1938 and numbered judicial reform among its demands.[23] Initially comprised of the post-elementary school graduates who formed Sudan's educated elite, the Congress soon began to splinter into opposing factions, with those favoring union with Egypt joining Ismail al-Azhari in forming the Ashiqqa (Brothers) Party in 1943, while those loyal to the Ansar leader Sayyid 'Abd al-Rahman, who advocated for a Sudan independent from both Egypt and the British, formed the Umma Party in 1945. When the Ashiqqa partnered with the Khatmiyya Sufi order some years later to found the National Unionist Party (NUP), Sudan's party system acquired the sectarian hue that would dominate in the post-independence era.

In response to these developments, the colonial government settled on a policy of limited accommodation. By making some concessions, however small or symbolic, administrators hoped to forestall further nationalist mobilization among the educated strata. Christopher Cox, who served as Director of Education and Principal of Gordon Memorial College from 1937 to 1939, advocated for the careful incorporation of educated Sudanese into governing institutions:

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[23] In 1942, the Congress presented a list of twelve demands to the colonial government, among them "the separation of the Judiciary from the Executive." The full list can be found in Abd al-Rahim, M. (1969). *Imperialism and Nationalism in the Sudan: A Study in Constitutional and Political Development, 1899-1956*. Oxford: Clarendon Press, 127-128.

> [T]he Sudan Government is a powerful autocracy, independent of the Colonial Office, untrammeled by an electorate, or by any unofficial representation on its Council, or by an influential Press, but no colonial Government can conduct for long a progressive or happy administration without the co-operation of the educated classes; to deny or delay their effective participation in the various branches of government means that disgruntlement turns into despair, despair into revolt, of which the end is Amritsar.[24]

In order to mollify nationalist sentiment in northern Sudan, the colonial government authorized in 1943 the formation of the Advisory Council, consisting of a mix of tribal representatives and civil servants hand-picked by the Governor General. The council failed to attract much support, however, and was scrapped in 1948 in favor of a legislative assembly. International pressures loomed large in this decision, as Britain was anxious to present the appearance of governance-by-consent during its negotiations with Egypt over Sudan's final status. Only the interests of northern Sudanese were really taken into account, however – a fact reflected by the final composition of the Legislative Assembly, in which only thirteen of seventy-five seats were set-aside for southerners. The body's legitimacy was further undermined by the Ashiqqa's decision to boycott the elections, allowing the Umma and tribal representatives to dominate the Assembly.[25]

For its first few years, the Assembly actually had very little to do. This was largely by design, since the British were not yet prepared to grant Sudanese actual political power. This all changed in November of 1950, however, when King Faruq of Egypt suggested that he might unilaterally abrogate the Condominium Agreement of 1899 and the Anglo-Egyptian Treaty of 1936 – the combined effect of which would have been to bring about the immediate union of Egypt and Sudan. In a state of panic, the Umma representatives forced through the Assembly a resolution calling for Sudanese self-governance by the end of 1951. The British were thrilled by this turn of events, because while it diminished their own control over Sudan, it also seriously undermined

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[24] C.M.W. Cox, "Note on Further Association of Sudanese With Local and Central Government in the Sudan." October 9th, 1942. SAD 667/10/7.
[25] Daly, M. W. (1991). *Imperial Sudan: The Anglo-Egyptian Condominium, 1934-1956*. Cambridge: Cambridge University Press, 265-268.

the case for union with Egypt. Over the early months of 1952, the colonial regime helped to draft a Self-Government Statute establishing a Sudanese-run government under British stewardship.[26] Protests from Egypt were ignored, and even these soon disappeared following the Egyptian Revolution that July.

The tables would soon turn, however. For years, the Egyptian government had hesitated to demand outright self-determination for Sudan, fearing that the country might decide to reject union and choose autonomy instead. This indecision on Egypt's part meant that the British could safely promise self-government, since they did not believe that King Faruq would ever call their bluff. And for a time, this strategy worked – until the Egyptian Revolution of 1952. The new government of General Muhammad Neguib introduced an entirely new logic to negotiations. In January of 1953, it drafted a new agreement directly with the Sudanese political parties, setting forth a framework for self-determination within three years and promising to respect the outcome, whatever it might be. Having made similar promises for some time now, the British were unable to object. Elections for a new government were held the following November, and due to incompetence on the part of the Umma, the Khatmiyya-backed NUP emerged dominant. While the new government stopped short of embracing union with Egypt, it was eager to see the British depart the country, and with few allies left either within Sudan or abroad, they were forced to oblige. On January 1st, 1956, the independent nation of Sudan was born.

The Sudanization of the Bench

While the Sudanization of the legislature and bureaucracy have, for understandable reasons, attracted the majority of attention from scholars, developments within the judiciary were no less significant. Of course, the existence of Sudanese judges dates back to well before the Second World War (a handful of Sudanese had been appointed District Judges of the Second Grade in the early 1930s), but none possessed any formal legal qualifications or experience in common law, and their numbers were

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[26] Under the terms of the plan, the Governor General exercised a veto over all legislation affecting external affairs, public services, and the south. He was also permitted to directly appoint two-fifths of the Senate.

always very small.[27] This all began to change in 1936, when the Kitchener School of Law was established in Khartoum, later to be incorporated into Gordon College. The regime had considered creating a civil law school since the 1910s,[28] motivated in part by the need for more trained legal personnel. The decisive push, however, eventually came from two directions: first from Sudanese nationalists lobbying for greater participation in the country's governance, and second from the colonial government anxious to establish an alternative to Egyptian law schools, which were the only realistic option at the time for Sudanese interested in becoming lawyers or judges.

Its first class consisted of only six Sudanese, but included in their number was one future prime minister, two judges of the High Court, and the country's first Sudanese attorney general.[29] The faculty was a mix of fulltime lecturers and employees seconded from the Legal Department, with courses on topics ranging from torts and criminal law to the principles of jurisprudence. Attempts were made by the Legal Department to send some of them to the University of London for an LL.B, but nothing ever came of it.[30] In this and all future classes prior to independence, the students enrolled in the law school were from the north. No secondary educational institutions existed in the south, and southern students were only permitted to enroll in northern schools under exceptional circumstances. This disparity in educational opportunities meant that upon the country's independence from colonial rule, almost all of Sudan's legal community – indeed, almost all of its political elites in general – were from the north.

It would only be with the outbreak of war in Europe, however, that the Sudanization of the judiciary began in earnest. The first breakthrough came in 1939, when all three Sudanese District Judges of the Second Grade were promoted to First

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[27] These were Muhammad Hilmi Abu Samra (appointed in 1932), Muhammad Saleh Shingeiti (1933), and Dardiri Muhammad Uthman (1935). Prior to Hilmi's appointment, all District Judges of the Second Grade were Egyptian and all those of the First Grade were British. See the *Quarterly Staff List* for the relevant years.

[28] Currie, J. (1934). "The Educational Experiment in the Anglo-Egyptian Sudan, 1900-1933 (Vol. I)." *Journal of the Royal African Society*. 33: 367.

[29] These were Muhammad Ahmed Mahgoub, Muhammad Abu Rannat and Muhammad Ibrahim al-Nur, and Ahmed Atabani, respectively.

[30] It would not be until 1953 that Sudanese judges and lawyers were permitted to enter the Inns of Court and join the English Bar. The first to do so was Babiker Awadallah, followed by Rayah al-Amin and Abdel Magid Imam.

Grade at the same time, replacing positions previously held by British judges. While this was an important step, the number of District Judges of either grade never numbered more than two or three, so the court system remained dominated by non-Sudanese personnel. Then, as the Second World War came to an end, there was a second breakthrough: in 1944 the ranks of District Judges of the Second Grade swelled from two to eight, all of whom were Sudanese (including Atabani, Maghoub, al-Nur, and Abu Rannat). Likewise in 1945, three more District Judges of the First Grade were added, also all Sudanese.

What impact did the introduction of Sudanese judges have on the colonial judiciary? Among some British judges, they were met with deep skepticism and alarm. Many loathed the prospect of additional competition for posts. Others doubted their honesty and fitness to serve. Judge Kevin Hayes, who sat on the High Court from 1945 to 1953, believed that Sudanese judges lacked the integrity, learning, and "capacity" to serve on the nation's highest courts. In a 1945 letter to CHA Bennett, who was Attorney General at the time, he warned that Sudanese judges were far too susceptible to bribery and family pressure. Hayes was particularly critical of the state of legal education in Sudan. Though he himself was an occasional lecturer at the School of Law,[31] he did not hesitate to assert that the training one received there was "no substitute at all for the true study of the law which is pursued at an English University or an Inn of Court by a student who desires to learn." He went on, "I do not run our Law School down; it serves an admirable purpose, but it does not aim to provide the background of Learning required by the Bench. Nor does the judicial experience of [a District Judge] supply the want."[32]

In general, however, the British were impressed by their diligence and attention to detail. Sudanese judges were active participants at national judicial conferences and placed a high premium on preserving the dignity of their office.[33] Abu Rannat in particular was singled out for his "profundity and nicety of legal knowledge" combined

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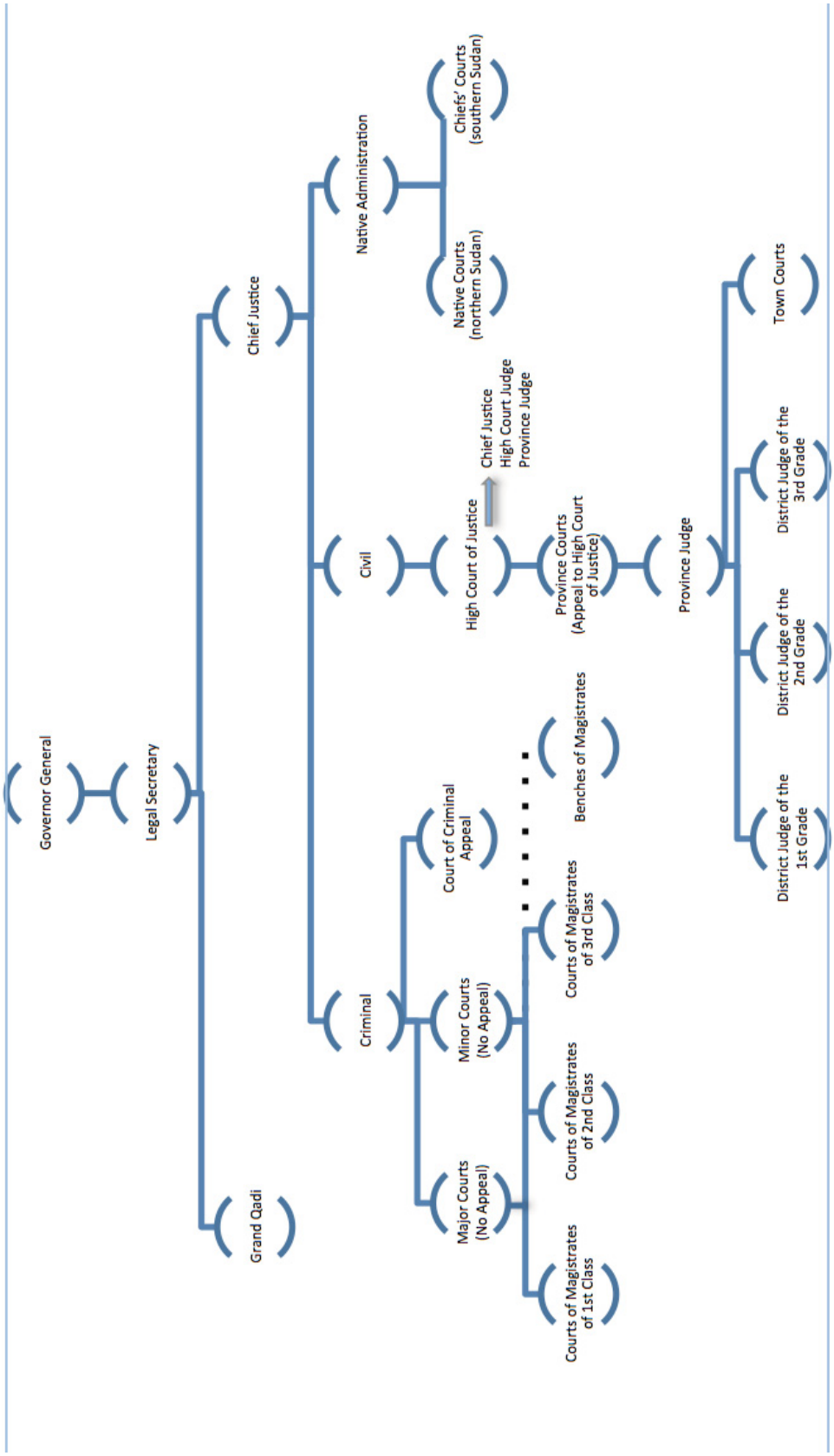
[31] From 1940 to 1942, Hayes taught courses on English law and legal theory, some of the lecture notes for which can be found at the Durham Sudan Archive. They provide a fascinating glimpse into legal education in colonial Sudan. See Hayes Papers, 12/68 G//S 471, SAD.
[32] Kevin Hayes, confidential letter to CHA Bennett on March 20th, 1945. SAD 959/12/15.
[33] "Agenda for the Judges Meeting, March 7th – 13, 1945." Hayes Papers, box 10, file 30, p. 9, SAD.

Figure 2.2: Structure of the Sudanese judicial system under the 1953 Transitional Constitution



with "most excellent common sense and judicial temperament and demeanor."[34] It would be Dardiri Muhammad Uthman, however, who in 1947 became the first Sudanese judge to sit on the High Court. Abu Rannat would join him four years later, and Atabani a year after that. Slowly, the number of Sudanese judges at all ranks of the judiciary grew, and while never great in number, they handled an outsized proportion of cases; from 1951 to 1953, Sudanese judges presided over 23% of all Major Court cases, including 20% in the High Court and 62% in District and Magistrate courts.[35] And while it is difficult to generalize about the judiciary as a whole, there was a certain professional solidarity between Sudanese and British judges within the higher ranks of the legal system.

In 1955, Abu Rannat was appointed Chief Justice, the first Sudanese judge to hold that position. The position of Legal Secretary, meanwhile, was eliminated shortly after Cumings's resignation in 1954 and its powers distributed between the Chief Justice and the newly created Ministry of Justice. By this point, it was obvious to all parties that the Sudanization of the judiciary could not be slowed, let alone reversed. While a few British judges still held out hope that they would find employment in the post-colonial order, most decided to take advantage of the new government's pension plan and retire. By the time independence was achieved in 1956, therefore, the Sudanization of the judiciary was almost entirely accomplished.[36]

Based on the preceding analysis, we can distinguish three broad categories of judicial reforms in the years between the Second World War and national independence. The first was the creation of new institutions and techniques designed to increase coordination between judicial actors. These included legal circulars describing proper judicial practices, the proliferation of law reporting, and the founding of the Criminal Court of Appeal. The second major category of reform was the professionalization of the judiciary itself. More will be said on this point in the next section, but suffice to say that its outward manifestations included the adoption of judicial robes, the founding of

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[34] Vasdev, K. (1979). "Chief Justice Abu Rannat: An Appraisal." *Khartoum Law Review*, 1:107.
[35] "Major Courts Tried in the Years 1951/1952 and 1952/1953." HAW 1/5/79, SAD.
[36] Some British officers retained their positions under the new order, though rarely for very long. In addition, a number of (non-British) foreign judges were brought in to staff empty positions, including five Indian judges, three Pakistanis, and one Palestinian. Kevin Hayes, official papers, 1953[?] SAD 965/2/83.

professional societies, and a zealous attention to judicial honor and dignity. Finally, the third major category of judicial reform was the widespread introduction of Sudanese judges. This process began in earnest with the founding of the Kitchener School of Law in 1936 and culminated eighteen years later with the appointment of Abu Rannat to the Chief Judgeship.

II. The Valorization of "Judicial Independence"

As the above discussion shows, the post-war years were a time of enormous growth in the strength and internal coherence of the colonial judiciary. Even reforms that one might expect to have undermined that coherence, such as the introduction of Sudanese judges to a heretofore British-dominated legal system, in reality resulted in a stronger judicial apparatus capable of handling more cases and over a wider geographic area. Increasingly, members of the legal community shared a common educational experience, belonged to the same professional associations, and were part of a single judicial hierarchy. Through the proliferation of legal circulars and law reports, judges and advocates were exposed to a common body of texts and textual practices, which were in turn articulated and affirmed through courts of appeal.

But a powerful judiciary was also one that naturally found itself in close contact with other branches of government and civil society. For some, it was a rival; for others, a potential ally. For nearly all, however, the rise of judicial power was an opportunity to creatively redefine the relationship between law and politics. As we shall see, this frequently involved the repeated deployment of the concept and institutional arrangements of judicial independence. Depending on how it was understood, judicial independence could be used to resist, control access to, or conceal political power. As such, the goal of an independent judiciary quickly acquired an appeal that transcended any specific class or political group. In this section, I explore the concept of judicial independence in Sudan more closely, with specific examples of how it was used both in support of and in opposition to the goals of the colonial regime.

Resistance to Politics

The first major way judicial independence was deployed is both the most straightforward and the least surprising: as a means for resisting political interference in judicial affairs. Due to its rapid expansion in scope and power described in Section One, by the 1940s the Legal Department found itself in frequent conflict with other branches of government, as occurred for example when the Registrar of Lands was stripped of his official car because he was not a supporter of the Prime Minister's political party. The Registrar of Lands was an important position within the Legal Department, with a rank and salary commensurate with those of a judge of the High Court. The loss of his car without cause, therefore, was greeted with enormous outrage by the judges, who promptly closed ranks around the Registrar on the grounds that the independence of the judiciary was at stake.[37] Such interference was not at all uncommon, particularly at the hands of the Civil Department, which would often accuse the Legal Department of placing formal justice above political necessity.[38]

At other times, however, clashes between the judiciary and other branches of government revealed differences within the Legal Department itself. For instance, in February of 1950, the Omdurman district commissioner demanded that a police magistrate drop fraud charges against an important member of the Coptic community. When he refused, the Legal Secretary himself began to lobby the magistrate in a flagrant violation of the latter's prosecutorial discretion. Judge Hayes responded angrily to this administrative interference by the Legal Secretary, complaining to Chief Justice William O'Brien Lindsay that "only disastrous results can arise" from an acquiescence to political expediency. "Not only is the integrity of the Courts immediately undermined but an Administration which can lend itself to such a practice is directly encouraging a form of corruption of the very worst kind…The outcome of any divergence in this respect is too dangerous to contemplate."[39]

Indeed, one of the interesting effects of these clashes is that over time, judges increasingly came to regard the Legal Department's administrative personnel as being, if not a threat to judicial independence, then at least outside of and separate from the

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[37] Donald Hawley, notes from Khartoum, March 22nd, 1955. HAW 1/6/49-50 (SAD).
[38] For more examples of such interference, see Hawley 1991, 43-45.
[39] Kevin Hayes, official papers, March 1950. SAD 959/13/14.

judiciary itself. The relevant distinction was no longer one of departments (eg. Legal versus Civil) but of vocation – of judge versus administrators or politicians. This new dynamic was particularly salient during the years immediately preceding independence, when it became clear to the judges that they would soon be dealing with an all-Sudanese government. By that point, the main point of contention had to do with whether the post-colonial judiciary would be run by the Chief Justice or a Minister of Justice. Those in favor of the latter pointed out that Sudan already had a *de facto* Minister of Justice in the form of the Legal Secretary, and that it would be a relatively simple affair to transfer his powers to a minister – much simpler, in fact, than burdening the Chief Justice with a whole host of administrative duties on top of his judicial ones.

For Sudan's judges, on the other hand, what was at stake was nothing less than the survival of the rule of law itself. The creation of a Minister of Justice, they argued, would subordinate the courts to the executive branch and strike a mortal blow to judicial independence. According to Hayes, "[the] judiciary in the Sudan would become as subservient as in other Eastern countries which have not had the advantages of a schooling in the British system of justice, and of resorting to judges of independent mind." Indeed, the only person fit to oversee a judge is another judge – there could be no compromise:

> It is difficult for an administrative officer, in or out of England, to realize the *necessity* of freedom for the judiciary. To the administrative officer the Courts are often a nuisance: they interfere with his benevolent plans and cause trouble…But all history shows that there will be no freedom at all if the judges are not free, and I repeat that we have now the simple choice between an independent judiciary and an all-powerful Executive, and there is no middle road.[40]

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[40] Kevin Hayes, letter to Chief Justice Lindsay, December 28th, 1950. SAD 959/13/29-30. Compare these remarks to ones Hayes made just five years earlier, at a time when judges and administrative personnel in the Legal Department enjoyed better relations: "We [the High Court] have been attacked from all quarters, many of them very exalted quarters, British and Sudanese, but we have never yet yielded a point of principle to personal pleas or to the plea of 'administrative considerations'. When I say the High Court I include of course *the whole department under LS* [Legal Secretary] *and the CJ* [Chief Justice]," (emphasis added). At this time, is clear that Hayes endorsed a much more capacious definition of the judicial branch, one that included administrative personnel as well as judges. Confidential letter from Hayes to CHA Bennett, March 20th, 1945. SAD 959/12/13.

These rhetorical shifts are important because they show how the distinction between the judiciary and other elements of government gradually coalesced in late colonial Sudan. Earlier generations of judges had not been particularly bothered by the fact that the judiciary was overseen by an administrative officer like the Legal Secretary. It was not until the late 1940s that the "problem" of administrative interference was discovered, because it was only then that a fundamental distinction was identified by the judges between the goals of the judiciary and those of the rest of the colonial state: whereas judges were intent on delivering justice, the administrative officer was only ever interested in "political expediency." For this reason, it was important to insulate the judiciary from any administrative or political pressure.

Controlling Access to Politics

The second way that the concept of judicial independence was deployed in this period was as a means for controlling access to politics. In this instance, it was more likely to be used *against* judges than by them. This was because the concept of judicial independence furnished politicians, administrators, and the nationalist movement with a whole range of justifications and arguments to limit certain kinds of public acts by judicial personnel. By involving themselves in politics, judges were warned, they ran the risk of compromising their independence and objectivity. In this sense, judicial independence means something very different than it does in the previous section – not the institutional autonomy of the judiciary, but its apoliticism.

For a clear example of this phenomenon, consider the *umdas* and *nāẓirs* presented in Chapter Two. Possessing powers that were neither fully judicial nor administrative in nature, they were often regarded as something of an "anomaly" in the colonial state.[41] Prior to 1953, they were answerable to their district commissioners and provincial governors, and so were technically a part of the Civil Department. Still, they were rarely thought of as civil servants in the same way that Sudanese bureaucrats in the cities and towns were. *Umdas* and *nāẓirs* had indigenous bases of support, and while they served at

[41] Hawley 1991, 49-50.

the pleasure of the colonial state, they were also the representatives of and mediators for their followers in all their dealings with the regime. A *nāẓir* could only maintain his position so long as he had the support of his constituency, so that meant he had to attend to their interests and campaign on their behalf. As a result, his office was inescapably political, as the colonial regime was quick to acknowledge. Indeed, their political role was a basic assumption of the Native Administration policy, which was predicated on the idea that native elites were a preferable cadre of political leaders to the nationalists.[42]

But for reasons already described in Chapter Two, Native Administration was a failure. *Umdas* and *nāẓirs* were not the bulwark against nationalism that so many British officers had believed them to be, and in fact were quickly enlisted into the nationalist cause; by the late 1940s they formed the backbone of the Umma Party.[43] In light of their growing involvement in national affairs, therefore, colonial officers suddenly began to find problematic their roles as both political actors and judicial officers. What had up till then been one of the central strengths of the tribal system – its "organic" combination of political and judicial authority – was now identified as a dangerous threat to justice and judicial independence. Tribal leaders were informed that while they had the right as private citizens to join political parties or publish in newspapers, their position as "public servants, local government authorities, and Judges" precluded them from taking "any active part" in national politics.[44]

But the colonial government was not the only one capable of mustering the idea of judicial independence in this way. Civil society activists, particularly those involved with the nationalist movement, also frequently cited the importance of an independent judiciary in order to silence or discredit their opponents. In 1953, for example, Judge Hayes penned an editorial in the London Daily Telegraph that criticized the incoming Sudanese government for failing to ensure that retiring British officers would receive a fair severance package and pension. This was an issue that had troubled Hayes for some time. Some months before, he had privately contacted both his own MP in England and

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[42] Bakhit, J. M. A. (1972). *Al-Idāra al-Barīṭāniyya wa al-Haraka al-Waṭaniyya fī al-Sūdān, 1919-1939*. Beirut: Dar al-Thaqafa, 139.
[43] Daly 1991, 165.
[44] CWM Cox, press conference held in the office of the Civil Secretary, June 12th, 1945. SAD 668/8/38-40.

the minister of state at the Foreign Office (a move he acknowledged at the time was potentially a serious breach of judicial neutrality), but received only bland assurances in response.[45] Hayes's decision to "go public" in the pages of the Telegraph, therefore, was a move of desperation that generated enormous controversy back in Sudan. "A highly placed member of the judiciary is obviously implicated in matters of pure politics," lamented an editorial in the Ansar organ *Al-Nīl*. "In view of the flagrant involvement in political matters, Judge Hayes must relinquish his post."[46] The newspaper *Al-Sūdān Al-Jadīd* was no more sparing in its assessment, stating that as someone who must "deal with all Sudanese litigants and constitutional questions, as well as partisan disputes," Hayes "ought to have first resigned his official position and then stated his view on the new order." Nothing less than the independence of the judiciary was at stake.[47]

Through this constant valorization of judicial independence, these actors were attempting to control when and in what manner judicial personnel could engage in political life. Their outrage, of course, was highly selective, as both the nationalist movement and the colonial government were more than happy to tolerate judicial involvement in politics when it suited them to do so. Regardless, their framing of the issue had consequences. Judicial independence was now a double-edged sword. It protected the judge from political interference, but it constrained his actions as well. It also furthered the idea of the law as a collection of discrete rules that the judge should dispassionately apply. Only by psychically divorcing himself from his own political beliefs and commitments could the judge do his work.

Politics in Disguise

The third and final way that judicial independence was deployed was as a means for disguising politics. By labeling a position, policy, or ideology as "legal" in nature, political actors found that their opponents would have a much more difficult time locating, scrutinizing, or challenging it. The independence of the judiciary functioned as

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[45] Hayes to Christopher Hollis Esq. M.P, March 28th, 1953. SAD 965/2/40-45.
[46] Editorial in *Al-Nīl*, May 14th, 1953.
[47] "Judge Hayes Grieves Over Responsible Government Posts and Antagonizes the U.K. Government Against the Sudanese," *Al-Sūdān Al-Jadīd*, May 13th, 1953.

a sort of alibi, concealing political power by disguising it as law. Even in those instances where what was being disguised was so patently controversial that it could not remain hidden, the institutional protections built into the judiciary made it difficult for executive or civil society groups to dislodge it.

There are many examples of this strategy at work, beginning with the entrenchment of Sudan's legal system in the common law, thereby making a political union with Egypt more difficult. An equally fascinating but much less remarked upon example, however, is the Resident Magistrate. While this attempt to disguise politics was ultimately unsuccessful, it is worth exploring because it illustrates so clearly the role played by judicial independence. Created by the Legal Department in 1953,[48] the office of Resident Magistrate was designed to have one foot in the Native Court system and the other firmly planted within the civil judiciary. Its ostensible purpose, in fact, was to bind the two judicial systems together into one unified administrative and appellate structure. Prior to 1953, Native Courts were overseen by district commissioners, meaning that important judicial decisions were being made by members of the Civil Department. Since this sort of arrangement was expressly forbidden by the Self-Government Statute, a new solution had to be found.

The Resident Magistrate was intended to be that solution. With the jurisdiction of both a District Judge of the First Grade (presiding over civil cases) and a Magistrate of the First Class (presiding over criminal cases), the Resident Magistrate was a uniquely powerful figure in the colonial judiciary. Short of a province or High Court judge, he was also the highest appellate authority for cases originating in the Native Court system. When not handling appeals, his other duties included directing police inquiries, managing lower court dockets, inspecting prisons, confirming the execution of sentences, and monitoring the quality of justice in the civil, criminal, and native courts in his jurisdiction.[49] This freed up the district and assistant district commissioners to focus

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[48] The first Resident Magistrate was H.C.N.M Oulton, who took office in Kassala in 1951. A second Resident Magistrate, J.C. Hunter, was stationed in Western Kordofan not long after. Both of their appointments, however, were temporary measures and the Resident Magistrate system would not be formally inaugurated until the spring of 1953.

[49] Guttman, E. (1956). "A Survey of the Sudan Legal System." *Sudan Law Journal & Reports*, 32-33.

exclusively on their administrative and executive duties, thus rendering the judicial system at once more effective and autonomous from political interference.

At least, this was the official story. But another, more calculating motive lay behind the creation of the Resident Magistrate: namely, that it allowed the colonial government to hide political officers in judicial positions, where it would be more difficult for the Sudanese government to remove them. This is because the Resident Magistrates were not just any judges – they were former district commissioners, men with little formal legal training but a vast knowledge of the colonial regime's political interests. By transferring or seconding them from the Civil to the Legal Department, the British hoped to prolong their control of the country, even beyond the date of formal decolonization. As a memo from the Foreign Office succinctly put it, "as many D.C.'s [district commissioners] should be tucked away in these posts, which would not be subject to Sudanisation, as possible." Properly executed and trussed up in the language of judicial independence, this strategy would "minimize the effects of Sudanisation" while leaving the Sudanese government to "take the initiative and bear the primary responsibility for such policy."[50]

While this arrangement won the support of some Sudanese elites, it was met with fierce disapproval from the Egyptian government, which rightly perceived the Resident Magistrates as little more than district commissioners by another name.[51] In order to diffuse the controversy, therefore, extra steps were taken to demonstrate the judicial *bona fides* of the Resident Magistrates, particularly at the level of optics:

> It is very important that the distinction between the Judiciary and the Executive [in the Resident Magistrate system] should be *clearly seen* by the people at large. That is the reason for such things as the ban on [wearing a] uniform, which does bear a little hard on a newly transferred or seconded DC. In due course magistrates will presumably wear robes, but meanwhile palm beach suits are worn. It is very important that his court should be public, and that as many spectators as possible should be permitted and even encouraged to attend. He should *not* try cases in his

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[50] W. Morris [?], "The Sudan: Appointment of Resident Magistrates," March 18th, 1953. FO 371/102752.

[51] R. Stevenson on appointment of Resident Magistrates, March 4th, 1953. FO 371/102749; Howe to Cairo Embassy, March 5th, 1953. FO 371/102749.

> own office. […] In such sessions it is necessary to insist on the dignity of the Court. A word to the Police beforehand ensures that all in Court stand when the judge or judges enter, and that they stand and remain standing (without an ugly rush for the door) when the judges rise and leave the Courtroom at the end.[52]

How successful was the Resident Magistrate program? For the colonial regime, not very; by 1955, all British Resident Magistrates had been replaced by Sudanese, disproving the regime's belief that the position would be immune to Sudanization. But as a means for popularizing the notion of judicial independence, it had a much larger impact. By the time Sudan became independent one year later, the inappropriateness of having a district commissioner wielding judicial powers was so *obvious* that a massive government campaign for local government reform was immediately launched. According to a 1960 survey of rural administration by the Sudanese government, thirteen Resident Magistrates were then serving in provinces across the country, particularly in the north. While it found that in some newer or more impoverished districts one might still find an administrative officer carrying out judicial functions, in most instances a Resident Magistrate had either already been dispatched or was in the process of being arranged.[53] The days when an ambiguous distinction between executive and judicial power was acceptable were clearly over.

III. The March Events and the Emergence of Judicial Power

The purpose of the preceding sections has been to demonstrate how the concept and institutional arrangements of an independent judiciary found support in a colonial autocracy. Through the efforts of a range of actors, including civil society groups, nationalist politicians, government officials, and the judges themselves, judicial independence served as justification, defense, and critique for everything from the Sudanization of the bench to the exclusion of native judges from politics. Each possessed a different understanding of what judicial independence meant or how it could be

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[52] Hayes memo on Resident Magistrates, December 23rd, 1952. SAD Hayes Papers, box 10, file 30 (emphasis in original).
[53] Government of Sudan. (1959). *Report of the Commission Coordination Between the Central and Local Government*. Khartoum: Government Printing Press.

achieved, but at their core was a common purpose: to define the limits of acceptable politics. In order to show once more how these strategies functioned and to bring together some of the most important trends in judicial reform described above, I would like to now turn to one of the seminal moments in late colonial Sudan: the Khartoum Riot of 1954, known colloquially in Sudan as the "March Events" (*aḥdāth māris*).

The basic facts of this episode are easy enough to recount. The National Unionist Party had dominated the elections of November 1953, much to the disappointment of both Abd al-Rahman and the British. On January 6th, 1954, Ismail al-Azhari was chosen by his party to be the country's first prime minister, and three days later he and his cabinet were sworn into office. Almost immediately, however, parliament was prorogued in order to give the new government a chance to form committees and develop policy. A new date, March 1st, was selected to be the first day of parliamentary debate, and al-Azhari was determined to make the occasion a memorable one. For that reason, he invited General Neguib, then president of Egypt, to attend the inaugural session, a decision that reflected both Neguib's popularity following the Free Officers' coup and al-Azhari's desire to flaunt the Egyptian's presence in the Ansar's face.

It was a provocative move, and one that almost immediately led to violence. As Neguib was being driven from the airport to the Palace, thousands of angry Ansar rushed into the city center, shouting slogans and denouncing the new government. Upon reaching Kitchener's Square, they were met by a small police squadron and ordered to disperse. When they refused, the police tried to clear the square with tear gas, but both the wind and the momentum of the crowd were against them. Armed with sticks and knives that they had concealed in their sleeves, the Ansar charged the police, who were completely unprepared for this sort of crisis.[54] In the end, eleven policemen were killed, including Hugh McGuigan, the British Commandant of the Police, who was literally hacked to pieces. Close to seventy more were injured, with many other dead and wounded among the Ansar.[55]

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[54] Berridge, W. (2012). "Guarding the Guards: The Failure of the Colonial State to Govern Police Violence in Sudan, ca. 1922-1956." *Northeast African Studies*, 12, 18.

[55] William Luce, unpublished memoir. SAD 830/1/43-64. According to one eyewitness, the crowd did not calm down until the Chief Justice emerged from the Secretariat and bid them do so.

Neguib was of course rushed from the scene, the opening of parliament was cancelled, and a State of Emergency was declared by the Governor General. Over the next several days, dozens of Ansar were arrested or detained for questioning across the country, and public buildings as far away as Unity in the south were temporarily shuttered.[56] It was a fiasco for all involved. Al-Azhari was humiliated on what was supposed to be his moment of triumph. The Ansar were in disarray, with many of their leaders either dead, under arrest, or being investigated by the police. And as for the colonial government, it was outraged over both the death of McGuigan and what it felt to be a betrayal by Abd al-Rahman, toward whom it was otherwise quite sympathetic. Fortunately, tempers and tensions soon cooled, helped in no small part by the earnest cooperation of all parties with the government's investigation. In the end, parliament opened again just ten days later, and while the atmosphere was considerably more subdued, the country continued its steady march toward independence.

But there is more to this story than just these basic facts. The March Events were part of a struggle between rival political factions, but they were also a conflict over the very nature and purpose of judicial power. Let us return to the swearing in of al-Azhari's cabinet on January 9th, or as it was auspiciously named by some colonial officers, "The Appointed Day." It was a day, however, that almost never happened. At the last minute, there was a deadlock between al-Azhari and Sir Robert Howe, the Governor General, over the position of Speaker of the Parliament. Al-Azhari wanted to appoint a minister from his own party, but Howe insisted he select a more neutral and apolitical candidate. It was not until 9:00 that morning that a final list of ministers was submitted, with Judge Babiker Awadallah put forth as Speaker. Though Awadallah was a known nationalist who had actively campaigned for independence, his background as a judge was sufficient to assuage Howe's concerns, and the swearing-in ceremony was allowed to go forward two hours later.

Every moment of the ceremony was carefully choreographed to showcase the dignity and power of the judicial branch. According to Donald Hawley, the chief

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However, I have not been able to find any corroboration of this account elsewhere. See A.J.V. Arthur, memoir and personal papers, March 7th, 1954. SAD 726/7/32.

[56] Unity High School logbook, March 1st through 3rd, 1954. SAD 906/7/81.

registrar at the time, the judges were transported from the Law Courts to parliament in a fleet of grey Humber Snipes, two to a car. Dressed in their newly acquired robes and wigs, the judges were seated to the right of the Governor General and the ministers to his left. Howe made a short speech in which he stressed, among other things, the importance of judicial independence and the role of the judges in safeguarding the country's institutions. Then the oaths of office were administered, first to the ministers and then to the judges themselves. At that point, a signed copy of the constitution was placed in the Chief Justice's hands, symbolically entrusting him with its protection. Finally, the Chief Justice himself congratulated al-Azhari and the ministers on their new government, adding that the judiciary "would stand firmly by any Government which governed according to the Constitution and the general law, whatever its political complexion."[57]

With the formalities over, the judges all returned to the Law Courts, where the Chief Justice officiated a second swearing-in for lower members of the judiciary (e.g. province judges, district judges, and magistrates), followed by another round of speeches about judicial independence. Later that night, al-Azhari and the new ministers joined Howe for a reception at the Chief Justice's house. Pleasantries were exchanged among the various guests, though not without some moments of awkwardness, as Hawley relates:

> I shook hands with the Prime Minister and could not but recall that the last time that I had seen him was when I was prosecuting him for sedition under Sec. 105 a year or two ago. I also had a talk with the Minister of Works Sayyed Mohammed Nur el Din. He asked me if [I] remembered when we had last met, and I said that I was happy to meet him on a more auspicious occasion. Our last meeting was when I sentenced him to six months imprisonment for the part which he played in the Atbara riots over the Legislative Assembly in 1948.[58]

Such humorous anecdotes notwithstanding, it is clear that one of the primary purposes of "The Appointed Day" was to demonstrate the autonomy and dignity of the judiciary. From the judges' clothing and bodily comportment to the speeches and

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[57] Hawley, letters to his parents, March 1st 1954. HAW 3/8/6 (SAD).
[58] Ibid.

symbolic depositing of the constitution in the Chief Justice's hands, the ceremony was calculated to impress upon the ministers that the judiciary was an equal partner in the Sudanese state. Furthermore, the decision to have the Chief Justice administer the oath of office to the lower court judges himself (as opposed to the Governor General or Legal Secretary) was a subtle way of affirming his position as supreme head of the judiciary. Finally, as many of speeches that day made clear, a self-governing Sudan would only endure so long as both the Chief Justice and prime minister worked together, accepting that while they were bound together in mutual dependence, each was sovereign in his own bailiwick.

Fast-forward seven weeks to the Khartoum Riot, on the other hand, and we see a very different story. Dismissing the State of Emergency as an insufficient response to Ansar violence, the Chief Justice had urged Howe to declare a Constitutional Emergency instead. The distinction is of enormous consequence, since the latter would have suspended the government entirely, delayed decolonization, and likely thrown the country into a UN Trusteeship.[59] Cooler heads eventually prevailed, but tensions between the Chief Justice and the al-Azhari government remained high.

The whole affair exploded back into the public consciousness later that summer when a Major Court convicted four Ansar for their role in the riot, sentencing one to death and the others to long prison terms. The case was immediately remitted to the Criminal Court of Appeal, which, given the sensitive nature of the case, was presided over by Chief Justice Lindsay and the High Court's two Sudanese judges, Abu Rannat and Muhammad Ibrahim al-Nur. While the judges upheld most of the lower court's ruling, they decided to commute the death sentence and shorten the prison terms. Their reasoning, as they explained in less than diplomatic language, was that the government was partly responsible for the riot as well.

> [The government] had allowed a situation to develop which at the end it was incapable of controlling…The security measures taken to deal with the situation were utterly inadequate and hastily improvised. The

[59] Foreign Office to Howe, March 24th, 1954. FO 371/108345.

> shortcomings of the Government are explicable on the grounds that it had no experience of how to govern."[60]

Al-Azhari was, unsurprisingly, furious with these remarks, which he claimed to be an attack by the judiciary on his government and an inappropriate meddling in its affairs. In its official response, the government accused the judges of exceeding their jurisdiction and acting unconstitutionally. The court decision, meanwhile, was dismissed as "mere abuse", proof that the entire judiciary was intent on undermining Sudanese independence. Almost simultaneously, a similar attack was launched by Cairo Radio, which wondered aloud why British judges were even still serving on the bench.[61]

The entire debacle took an even more serious turn not long afterward, when the Chief Justice was informed by the Sudanization Committee that it now considered its jurisdiction to include the judiciary, and therefore that he and his British colleagues should prepare themselves for termination. Abu Rannat and al-Nur immediately pledged their support to Lindsay and promised to resign in sympathy, but it was clear that even this would have been a futile gesture.[62] Frustrated by their lack of support in the government and fearful of setting a precedent of political interference in judicial affairs, the British High Court judges chose to resign instead. With that, Abu Rannat was made Chief Justice instead, new High Court judges were appointed, and the colonial judiciary effectively came to an end.

My purpose in this section has not simply been to present an important moment in Sudanese history from the judiciary's point of view, though it is certainly a perspective largely ignored by scholars of the period. Rather, it was to show how the concept of judicial independence, as well as the distinction between law and politics that it helped produce, structured so much of Sudanese public life in this period. Even in the context of an autocratic state like Condominium Sudan, all actors had a powerful motivation to articulate, defend, and institutionalize the idea of an independent judiciary. What the March Events illustrate is how ambiguous and contested that idea was, and how high the

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[60] Court of Criminal Appeal, *Abdalla Abdel Rahman Nugdalla & Others v. Sudan Government*, August 8th, 1954.
[61] Hawley, relations between the judiciary and executive, 1954. HAW 1/6/29-31 (SAD).
[62] Hawley, letter to Chief Justice Lindsay, August 23rd, 1954. HAW 1/5/73-77 (SAD).

stakes were for those involved. Was the judiciary an active and equal partner in the governance of Sudan, or was its position more passive and reflective? What responsibility, if any, did it have to monitor and critique political power? Did a Sudanese state necessarily entail a Sudanese bench, and if so, did that mean that national independence trumped judicial independence? These were not new questions, or even questions unique to Sudan. But in the years following the Second World War, they erupted onto the colonial stage as never before, giving interested actors a remarkable opportunity to shape the nature and limits of political power.

IV. Conclusion

In a 1940 lecture at Gordon College, Judge Hayes divided governmental powers into three types: legislative, judicial, and executive. Each was necessary for a state to function, but according to Hayes, only the legislature and the judiciary had an objective existence. The power of the executive, by contrast, was simply "the residue after the others [were] deducted."[63] In 1952, however, he gave a very different answer to essentially the same question. Responding to a letter by Abu Rannat requesting further Sudanese representation on the High Court, Hayes explained that the entire idea of subjecting the judiciary to Sudanization was built on a faulty premise.

> [The letter] bases too much argument on that old, colourful but inaccurate division of government into the legislative, the executive and the judicial powers (De Tocqueville's, wasn't it?). I don't think any serious jurists accept this today, and no constitution – not even the USA which De Tocqueville had in mind – can show it in action. If the judicial function can fairly be described at all as a power of government, it is obviously in a different category to the powers of Parliament and the Executive.[64]

Between his lecture in 1940 and his musings on de Tocqueville some twelve years later, something shifted in the way Hayes and many other judges, politicians, administrators, and activists conceptualized the judiciary. The purpose of this chapter has

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[63] Hayes lecture on jurisprudence, April 21st, 1940. Hayes Box 12/68 SAD, p. 16.
[64] Correspondence between Hayes, Abu Rannat, and Babiker Awadallah. December 17th, 1952. SAD 965/1/18-19.

been to explain what that shift entailed and how it came about. We know that it involved the professionalization of the judiciary, an increase in judicial power and coordination, and the appointment of Sudanese judges to the bench. As the judiciary grew in strength and internal coherence, it became increasingly important to define its relationship with politics. Judicial independence, as both normative concept and institutional arrangement, was the vehicle for achieving this, and thus became a popular trope among both colonizers and colonized. It served variously as a way of resisting, controlling access to, and concealing the nature of political power. For colonial administrators, this entailed restricting political activism among Sudanese judicial personnel while simultaneously disguising the appointment of district commissioners as Resident Magistrates. For British judges, it referred to the insulation of the judiciary from external meddling, whether that meddling was Sudanese in origin or came from within the colonial government itself. And for many in the nationalist movement, it was a means of discouraging British control over the courts and hastening the transfer of political power. Little wonder, therefore, that the idea of judicial independence became so widespread within Sudanese society, even if the basic content of that idea remained contested.

But it would be a mistake to conclude from all these disagreements that no common understanding of the judiciary existed. On the contrary, nearly all voices agreed that law and politics were distinct fields. There was plenty of disagreement over where that distinction should be drawn, as the debates over judicial independence make clear, but the fundamental distinction itself was widely accepted. Indeed, by the time independence was achieved in 1956, something very close to what the political theorist Judith Shklar calls "legalism" prevailed in Sudan. Legalism, according to Shklar, refers to the idea, a fixture of Western legal thought, that the law is a discrete entity that exists "out there," independent of politics or morality and possessing its own integral history, language, and maxims. Under legalism, the business of the law becomes associated with the following of procedure, of a set of practices that can be performed, compared, measured, and repeated as necessary. This proceduralism gives the law its structure, and prevents it from indulging in expediency, something more proper to the domain of politics than to law. Law concerns itself with justice, and as such must be insulated from

the corrupting influence of politics. The independence of the judiciary, therefore, is one of the major institutional expressions of legalism as ideology.[65]

This sort of hard distinction between law and politics seems miles away from the ambiguity and illegibility of the native courts described in Chapter Two. But this points to one of the fundamental differences in the way the British and Sudanese conceptualized the tribe versus (for wont of a better term) the civil state in which the colonial judiciary did its work. Whereas the tribe was a bounded unit with clear limits and a natural order, the larger civil state was thought to be unstable, perpetually teetering on the edge of either revolution or collapse. Whether from nationalist forces within or Egyptian influence without, there was simply no way that the civil state could be trusted to reach any sort of natural equilibrium. Legibility was something that had to be imposed, up to and including the legibility of the law/politics distinction. Strategic ambiguity was simply not a viable option.

Amidst such conceptual architecture, the judge served a very special role as the mediator between the general and the specific, between the rule and its exception. The instability of the civil state required the imposition of an artificial order, but one that was matched with a sensitivity to local contexts and circumstances. Chief Justice Lindsay, in a speech about the Legal Secretary but with words that could as easily have been applied to a judge, describes his task as being "to improve our professional standards" and maintain "our impartiality and integrity", while at the same time "to keep in touch with the needs of the people and make no fetish of mere technicalities."[66] This is the tension that animated the colonial judiciary for the entirety of its existence and that it would eventually bequeath to its postcolonial successor. Over the course of the next two chapters, we will explore these and related problems in greater depth, as well as some of the new solutions proposed to resolve them.

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[65] Shklar, J. (1964). *Legalism: Law, Morals, and Political Trials*. Cambridge: Harvard University Press.

[66] Lindsay's speech on the occasion of the Legal Secretary's retirement, undated. HAW 1/6/50 (SAD) obverse side, as scrap.

CHAPTER FOUR: THE RISE AND FALL OF JUDICIAL POWER, 1956-1976

Introduction

In the previous chapter, I traced the development of Sudan's civil judiciary from the Second World War to national independence. This was a period of rapid professionalization, as new institutions were established and legal procedures formalized. Judges enjoyed a great deal of prestige and popular legitimacy, and judicial independence was a widely cited principle of good governance. Of course, as was demonstrated, support for judicial independence both inside and outside the colonial government did not necessarily spring from a deeply felt commitment to the rule of law or separation of powers. On the contrary, it was quite often a tactic to define the proper limits of political activism. Judges, lawyers, politicians, and civil society activists all had different and competing notions of what judicial independence entailed or how the law should be applied. Despite this diversity of interests and ideologies, however, there was remarkable unanimity regarding the judiciary's importance, a fact reflected in over a decade of favorable government policy. As a result, by the time Sudan won its independence on January 1 1956, the judiciary was one of the single most powerful institutions of the Sudanese state.

This chapter picks up where the last one left off, charting the evolution of the civil judiciary from decolonization in 1956 to 1976, after which the courts entered into a new stage of unprecedented reforms known collectively as the "Judicial Revolution". This twenty-year period offers some of the most dramatic moments in the history of Sudan's judiciary, including both its rise to unparalleled power and prestige from 1956 to 1969, and its collapse into factionalism and weakness from 1969 to 1976. How can we explain this ebb and flow of judicial power? Why was the judiciary so successful in asserting itself during the first period, only to retreat so quickly during the second?

In this chapter, I argue that the judiciary owes its relative power or weakness to two variables: first, its own internal unity, both institutionally and ideologically; and second, the prevailing balance of political power in which it operated, particularly the

strength of the regime and its ability to effectively manage intra-regime and inter-party divisions. During the period of the judiciary's greatest strength (1956-1969), Sudan's political landscape was deeply fractured. No single political party or faction was able to win out over the rest, leading to a succession of weak and unstable governments. Under these conditions, the regime could not prevent state institutions from accumulating power and autonomy. However, not all institutions were equally capable of seizing this opportunity, which is why the judiciary in particular – with its small size, institutional unity, and ideological homogeneity – was so successful. Larger and more heterogeneous institutions, meanwhile, were not nearly so fortunate.

Conditions for the judiciary began to decline during Sudan's so-called "second democratic interlude" (1964-1969),[1] but it was not until Ja'far Numayri seized power that they grew truly grave. Again, the two key variables were the judiciary's own internal unity and the prevailing balance of power. Immediately following Numayri's coup d'état in May of 1969, the regime moved to suppress or neutralize all of its political opponents, particularly the Umma and the Sudanese Communist Party. In just a few short years, it succeeded in producing the strongest Sudanese state since decolonization. At the same time, it accelerated a process of judicial fragmentation begun under the former democratic government, establishing a proliferation of new judicial and quasi-judicial institutions as a way of "increasing judicial efficiency". Not only did this parallel judicial network compete with the formal (i.e. constitutional) judiciary for scarce resources, but it also damaged its prestige and popular legitimacy. As a result, when the regime announced its intention to adopt sweeping judicial reforms in the late 1970s and 1980s (discussed in Chapter Five), the judiciary was unable to muster much resistance.

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[1] In the parlance of Sudanese scholarship, the country has seen three periods of democratic rule: the First Interlude (1956-1958), the Second Interlude (1964-1969), and the Third Interlude (1985-1989). The events of the last interlude are beyond the scope of this dissertation and need not concern us here. The first two, however, are grouped together in this chapter with the authoritarian regime of Ibrahim Abboud (1958-1964) to form a single analytical period. Despite the heterogeneity of regime type during this period, the judiciary's strength and independence was fairly constant, especially in comparison to later years. Nevertheless, certain unique trends begin to emerge during the mid-1960s that are explored at length in Section Two of this chapter, and that in many ways anticipate the developments of the 1970s.

This interpretation of regime-judiciary relations during the early post-colonial era differs from that of the existing literature in two key respects. First, it presents both the regime and judiciary as being far more diverse and multi-vocal than is usually the case. Abdullahi Ali Ibrahim, for example, argues in his excellent work *Manichaean Delirium* that regime-judiciary relations during the 1960s were characterized by a conflict between a decolonized state and a "westernized" legal system. The regime's decision to implement judicial reform, Ibrahim claims, was actually a response to the "moral injury" inflicted on it by a still-colonized judiciary.[2] But this interpretation of judicial politics potentially obscures the diversity of political and legal actors at work. While it is true that at some points in the 1950s and 1960s the regime viewed the judiciary as a threat, at others it was the judiciary's greatest friend and advocate. Likewise, the judiciary did not always fight all of its battles against the regime alone. On the contrary, it found many willing allies – particularly in the civil service, where its ideology of legalism was in broad sympathy with the bureaucratic rationalism then in vogue among the country's civil servants. The resulting picture of regime-judiciary relations is considerably more complex and multi-vocal than Ibrahim's version may allow.

The other key difference from the existing literature is the way that this chapter treats the regime's discourse on judicial speed and efficiency – that is, it takes it seriously. In justifying the raft of legal reforms to which the judiciary was subject under Numayri, members of the regime would often cite the inefficiency (*'adamu kafā'a*) of the civil courts. The temptation among scholars has always been to dismiss this discourse as simply a distraction from the regime's real objective of crushing judicial power.[3] But as this chapter demonstrates, the regime had very genuine fears about mounting judicial incompetence, rigid proceduralism, and an unreasonably large case backlog.[4] The public,

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[2] Ibrahim, A. A. (2008). *Manichaean Delirium: Decolonizing the Judiciary and Islamic Renewal in the Sudan, 1898-1985*. Leiden: Brill, 165-220.

[3] See for instance Khalid, M. (1986). *Al-Fajr al-Kādhib: Numayrī wa Taḥrīf al-Sharī'a*. Cairo: Dar al-Hilal, 279.

[4] By way of confirmation, we can find very similar concerns in other African judiciaries during the 1970s and 1980s. Jennifer Widner has described the crisis faced by judges in southern and eastern Africa over long delays in criminal and civil cases, prompting the creation of special judicial efficiency boards, the privatization of the courts' administrative functions, and changes to

by and large, shared these fears, which were then harnessed by Numayri when he created a parallel judiciary. Of course, citizens had fewer rights in this judiciary and the judges were more susceptible to executive pressure, but the regime was able to justify these compromises in the name of speedier justice.

I divide this chapter into three sections. First, I explore the rise of judicial power and independence in Sudan during the first thirteen years following decolonization, from 1956 to 1969. Using both a "balance-of-power" explanation and one grounded in the historical and ideational context of the judiciary, this section analyzes the emergence of the judiciary as perhaps the single most powerful institution of the Sudanese state. Just as importantly, it also explains why it was the judiciary *in particular* that rose to prominence, and not some other state institution. Second, I explore the struggle over judicial power that occurred during the late 1960s within the civil service – an oft-neglected episode that nevertheless prefigures the judicial fragmentation of the 1970s. Importantly, this section reveals that it was not only Sudan's authoritarian governments that sought to rein in the power of the courts – it was also its democratic ones, which frequently viewed the judiciary as an obstacle to be overcome instead of a co-equal partner in government. Finally, in the third section I explain how the judiciary's power and independence came to at least a temporary end. From 1969 to 1976, the Numayri regime seeded the state with new judicial and quasi-judicial institutions, to which it devolved great power and jurisdictional discretion. This fragmentation of judicial authority, coupled with a growing perception throughout society that the courts had grown slow and inefficient, proved devastating to the civil judiciary, ultimately setting in motion the Judicial Revolution of the 1980s.

I. The Rise of Judicial Power, 1956-1969

Having supported and in many cases led the cause of national independence, Sudan's judges wasted no time in asserting their own. In the first thirteen years following decolonization, the judiciary seized nearly every opportunity to demonstrate both its influence and indispensability in national affairs, often inserting itself into contentious

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the judicial calendar. According to Widner, however, success has been mixed. Widner, J. (2001). *Building the Rule of Law*. New York: W.W. Norton & Co., 233-272.

political disputes. Yet while individual judicial initiatives and decisions had no shortage of detractors, the institution itself remained largely immune to large-scale attack. Indeed, more than anything else, these years are characterized by relatively cordial relations between judiciary and regime, whether that regime be the authoritarian government of General Ibrahim Abboud or the civilian governments of Sudan's first and second democratic interludes. As we shall see, this détente began to fracture during the second half of the 1960s (that is, during the second democratic interlude), but it did not break down completely until after the so-called May Revolution swept Ja'far Numayri into power in 1969. The thirteen-year period in between decolonization and Numayri's reign, therefore, is frequently considered to be the heyday of judicial authority and independence.

Measuring Judicial Power

Evidence of the courts' strength can be found in numerous arenas. For instance, the judiciary moved quickly after independence to establish its right to judicial review of government action, even though no formal description of this power was included in the Transitional Constitution. Using the occasion of a tenant-landlord dispute in 1956 to which the government was a party, the High Court held (with Chief Justice Abu Rannat writing the opinion) that the judiciary had the power to compel governmental compliance with a judicial order.[5] This finding was elaborated on two years later in another High Court case, in which the primacy of the Constitution over parliament was interpreted as endowing the judiciary with ultimate legal authority.[6]

The practical effects of these decisions, moreover, were felt almost immediately. Table 4.1 shows the outcome of major cases before the High Court and courts of appeal between 1961 and 1968, a period spanning both the authoritarian government of Ibrahim Abboud and the civilian governments of Sudan's second democratic interlude.[7] While by no means exhaustive, it captures the frequency with which the courts were willing to

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[5] *Mohammed Adlan v. Sudan Government, Awad El Sid Abdullah & Others* (1956).
[6] *Building Authority of Khartoum v. Evangellos Evangelledes* (1958).
[7] All cases are drawn from *Sudan Law Journal & Reports*, with "major cases" defined as any case in which the subject matter directly affects the regime's security or political dominance. Cases to which the government is not a party are excluded, as are those heard by religious courts.

decide against the government, particularly in cases involving the powers of the state's coercive apparatus (e.g. detention without charge, the legality of torture, admissibility of evidence, etc.). In cases involving political or constitutional matters (e.g. press freedom, opposition party organizing, etc.), its record is more mixed, while still showing a strong bias against the government. Finally, cases categorized as "Other" generally relate to issues surrounding intra-government disputes involving the civil service and lower courts. Following a "decisional model" of judicial independence, this record provides strong evidence of the judiciary's institutional autonomy from executive pressure or interference.[8] Otherwise, such a consistent pattern of anti-regime court decisions would likely not have been possible.

Table 4.1: High/Appellate Court Cases, 1961-1968

	Pro-Gov. Rulings	**Anti-Gov. Rulings**
Coercive Powers	2	13
Political/Constitutional	4	7
Other	4	2
Total (%)	**10** (31%)	**22** (69%)

Source: *Sudan Law Journal & Reports*, 1961-1968.

Another sign of the courts' power during these years was the consolidation of Sudan's judicial support network. As Tamir Moustafa has argued, judiciaries rely on their support networks for education, training, material resources, and popular legitimacy. By incapacitating these support networks, a regime can undermine judicial independence

[8] Following Maria Popova, the decisional model defines an independent judiciary as one that "delivers decisions that do not *consistently* reflect the interests of a particular group of actors." Unlike institutional definitions of judicial independence, the decisional model does not mistake formal independence (in the form of rules and procedural safeguards) for actual independent outcomes (i.e. independent decisions), which are what matter most in the present analysis. See Popova, M. (2012). *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*. Cambridge: Cambridge University Press, 14.

while still leaving judges and courts formally untouched.[9] For this reason, it is significant that Sudan's judicial support network flourished between 1956 and 1969. In 1956, for example, *Sudan Law Journal & Reports*, the country's premier law review, began its publication, marking an important contribution to the development of Sudanese common law. The school of law at the University of Khartoum, meanwhile, which enjoyed both institutional autonomy and great international prestige, was joined in 1955 by a second degree-granting law faculty at Cairo University's Khartoum branch. Together their graduates filled the ranks of legal professionals in both the civil and *shari'a* divisions of the judiciary. Between 1956 and 1964, for example, the number of civil attorneys registered on the Roll of Advocates grew from thirty members to two hundred.[10]

But perhaps the strongest evidence of judicial power was the frequency with which the judiciary was called upon to study, comment on, and intercede in the most controversial issues of the day. It is not at all uncommon for regimes, whether democratic or authoritarian, to delegate politically divisive matters to the courts, since doing so affords the regime a ready-made scapegoat in case the resulting policy decisions prove unpopular.[11] If properly insulated from political pressure, moreover, judiciaries can use their expertise to resolve complex problems in ways that other political actors cannot. This is partly why High Court judge Babiker Awadallah was selected as Sudan's first speaker of parliament in 1953, as discussed in Chapter Three, and then later tasked with heading up a commission to draft a permanent constitution in 1956.

Similar appointments from amongst the judiciary soon followed. During the Abboud regime, Abu Rannat was appointed to chair two important commissions involving administrative reform. The first of these drafted the legislation that would become the Provincial Administration Act of 1960 and the Local Council Act of 1962. These were significant reforms, as they resulted in the abolition of the position of district commissioner, created new representative bodies at the provincial level, and transferred

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[9] Moustafa, T. (2007). *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge: Cambridge University Press, 54-56.
[10] Massoud, M. F. (2013). *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge: Cambridge University Press, 100.
[11] Ginsburg, T. and T. Moustafa, Eds. (2008). *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press, 9-10.

budgetary authority from Khartoum to local governments.[12] While the Act was cancelled following the Abboud regime's fall in 1964, Abu Rannat's work served as a model for the more enduring People's Local Government Act of 1971. He was also the chairman for the commission that established the Central Council, which briefly replaced the Constituent Assembly as Sudan's chief legislative body from 1962 to 1964. None of these reforms were especially popular, as they marginalized the south and weakened the opposition political parties. By delegating their design to the judiciary, however, the regime may have been able to avoid the worst of the blowback.

Finally, in what were perhaps the most naked displays of judicial power during this period, Sudan's judges and lawyers played a key role in the fall of two regimes. First, during the so-called October Revolution, which overthrew the Abboud government and returned the country to civilian rule, the judiciary interceded at numerous points to undermine the regime's legitimacy. The causes of the revolution are many, but the immediate catalyst was the death in October 1964 of a student during an anti-regime demonstration. The next day, tens of thousands of protesters flooded the streets in response, including many judges and lawyers. One of these protesters was Hassan al-Turabi, the leader of the Islamic Charter Front (ICF) and himself a trained legal professional. His fiery speeches and central role in the protests did much to launch his political career. Though the regime was quick to declare these protests illegal, the ban was immediately countermanded by the High Court, which exercised its "supreme authority" to issue a permit for a massive demonstration.[13] This intervention by the judiciary proved decisive, as the next day Abboud entered into negotiations with anti-regime leaders. Within two weeks, a transitional government was formed from among the major parties, and on November 14th, Abboud officially stepped down from office, ending Sudan's first period of post-colonial authoritarian rule.

The second occasion in which the judiciary helped to bring down a regime took place under much less auspicious circumstances. The Umma-led government that

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[12] Vasdev, K. (1979). "Chief Justice Abu Rannat - An Appraisal." *Khartoum Law Review* 1: 100, 132-133; Alassam, M. 1970. *Decentralisation in the Sudan: Decentralisation, Ecology, Development and Reform*. Khartoum: Ministry of Culture & Information, 21-26.
[13] Collins, R. O. 2008. *A History of Modern Sudan*. Cambridge: Cambridge University Press, 81.

replaced Abboud was extremely unstable, and was often so focused on its opponents in the Khatmiyya's Democratic Unionist Party (DUP) that it neglected to carry out much-needed reform. Both major Sufi parties, however, were united in their common enmity toward Sudan's Communist Party. The Communists had actually grown stronger during Abboud's rule, and now posed a threat to the sectarian parties. For that reason, the Umma and DUP worked together in 1965 to pass a law that banned the Communist Party, expelled its MPs from parliament, and seized its assets. When the law was challenged by the MPs, the High Court promptly struck it down, declaring it to violate the constitution.[14] The government, however, chose to ignore the court's decision. While claiming to respect the judiciary's power of judicial review, it dismissed the ruling as nothing more than a "declaratory judgment", and therefore did not require any legislative action.

The response from the judiciary was immediate and overwhelmingly hostile. The Bar Association went on strike and many prominent judges, including those sitting on the High Court, launched a public relations campaign to shame the government into respecting its ruling. Awadallah, who succeeded Abu Rannat as Chief Justice the previous year, penned an open letter to the regime condemning its actions and demanding that it immediately back down. Importantly, Awadallah chose to write his letter in Arabic instead of English, which was the dominant language of the judiciary at the time but was unknown by most Sudanese. The letter found its way into the hands of the major newspapers and was widely disseminated across the country. When the government still refused to reinstate the Communists, Awadallah announced his resignation in protest.[15]

Not only did this showdown between the regime and the judiciary cost the Umma a great deal of public support, but it also removed Awadallah from the political stage at a moment when Sudan could ill afford to lose him. As someone who commanded enormous popular respect, the Chief Justice had been called upon on several occasions to broker deals and ease tensions between Sudan's various political factions. Without his help, conditions quickly deteriorated. In 1967, party infighting split the Umma into

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[14] *Joseph A. Garang & Others v. The Supreme Commission & Others* (1965).
[15] Massoud 2013, 103-104.

warring camps, costing it more than half its seats in the next election. The DUP formed a new government in 1968, but it too was paralyzed by parliamentary bickering.

Just a few months later, the regime would have a new reason to regret forcing Awadallah's resignation. In May of 1969, amid widespread protests and demonstrations, the civilian government was toppled by a military coup. Of the ten men who comprised the junta's Revolutionary Command Council, nine were military officers. Awadallah was the tenth. His presence endowed the new regime with much-needed legitimacy, and for his efforts was promptly installed as vice president. It was the final act of revenge by a Chief Justice betrayed by his government, and it brought about a second period of authoritarianism that lasted until 1985.

Explaining Judicial Power

How can we explain the strength and independence of Sudan's judiciary during the 1956-1969 period? Recall our discussion of the Rule by Law literature in Chapter One, wherein two critiques of the "pathologies" approach to explaining judicial empowerment were presented. The first critique emphasized the importance of historical and ideational factors, which shape how the regime identifies, evaluates, and manages judicial institutions. Rather than treat regime behavior as a straightforward product of interest-based calculation, it suggests that other factors (e.g. values, international norms, historical trauma, etc.) play a crucial role. The second, more damaging critique dismisses the importance of institutions all together, and instead explains judicial empowerment as the product of the prevailing balance of power. If a regime is very weak, for instance, it might permit or even encourage judicial empowerment as a means of achieving some goal, but only in so far as it *is* weak. Once the balance of power shifts (i.e. the regime grows more secure) it is unlikely to allow judicial power to constrain its behavior in any significant way.

As was argued in Chapter One, these two critiques are not contradictory. Though they differ in the relative importance they place on institutions, both are needed in order to understand the rise of judicial power in early post-colonial Sudan. Taking first the balance-of-power explanation, it is no accident that the high point of judicial power coincided with a period of extreme instability in the Sudanese state. Two central

cleavages concern us here: partisan rivalries and the North-South civil war, both of which produced remarkably weak regimes. Between 1956 and 1969, the country cycled through governments at a rate of nearly one every two years, hiring and firing hundreds of ministers in the process. As illustrated in Table 4.2, bickering between the Umma and NUP (later renamed the Democratic Unionist Party, or DUP), as well as divisions within the Umma itself, limited the term of most prime ministers to a matter of months only. In fact, so complex and tortuous were the coalitions that produced these governments that on three separate occasions, the prime minister actually belonged to a different party than the one in control of parliament.

Table 4.2: Governments of Sudan, 1956-1969

Leading Political Party in Parliament	Time Period	Prime Minister
National Unionist Party	Jan. 1956 – July 1956	Ismail al-Azhari
Umma Party	July 1956 – Nov. 1958	Abdullah Khalil
Military rule	*Nov. 1958 – Oct. 1964*	*Ibrahim Abboud*
United Front (Transitional Govt.)	Nov. 1964 – Feb. 1965	Sirr al-Khatim al-Khalifa
Umma Party (Transitional Govt.)	Feb. 1965 – June 1965	Sirr al-Khatim al-Khalifa
Umma Party	June 1965 – July 1966	Muhammad Ahmad Mahjub
Umma Party	July 1966 – May 1967	Sadiq al-Mahdi
National Unionist Party and People's Democratic Party	May 1967 – May 1968	Muhammad Ahmad Mahjub
Democratic Unionist Party	May 1968 – May 1969	Muhammad Ahmad Mahjub

(Time periods shaded in grey indicate that the political party in control of parliament was different from that of the prime minister.)

Amidst these mayfly regimes, the comparatively long-lasting rule of Ibrahim Abboud represents a period of seeming durability and coherence. This stability, however, was only skin deep. Few members of Abboud's inner circle had much experience governing. As a result, the regime was forced to rely on many of the same dysfunctional alliances, institutions, and political arrangements that had proved so harmful during periods of democracy.[16] Even more damaging was the renewal of hostilities between the north and south. In the hopes of greater national unity, Abboud had adopted a policy of forced "Arabization" and "Islamization" in the south. The response of the region's leaders was deeply hostile, leading in 1963 to the founding of the Sudan African National Union (SANU), which launched a vigorous political campaign to organize southern resistance to the Abboud regime. Later that same year, SANU leaders formed a guerilla movement called the Anya-Nya, which quickly grew to include some 5,000 soldiers. While the Anya-Nya rebellion never posed an existential threat to the regime, it did enjoy widespread popular support in the south and succeeded in eluding all efforts by the national army to suppress it. By 1964, the so-called "Southern Problem" had rendered the regime so unpopular that it was forced to make deep concessions to northern opposition parties, setting in motion the forces that would ultimately bring Abboud's rule to an end.[17]

This instability within government, present during times of both democracy and authoritarianism, created an important opening for judicial power. Despite repeated instances in which judges struck down or challenged executive authority, Sudan's political leaders were either unable or unwilling to take any substantive action against judicial power and independence. In many, though not all, instances, judicial power and independence were actually *promoted* by Sudan's political leaders, as the courts were capable of acting in matters and executing policies that the regime was not. As Mark Massoud has put it, the judiciary was the direct beneficiary of the state's widespread

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[16] Khalid, M. (1990). *The Government They Deserve: The Role of the Elite in Sudan's Political Evolution*. London: Kegan Paul International, 163.
[17] Hasan, Y. F. (1967). "The Sudanese Revolution of October 1964." *The Journal of Modern African Studies* 5(4): 491-509.

political incompetence.[18] So long as Sudan's political parties and military leaders were more focused on defeating each other than forming a stable, coherent government, the judiciary was able to go about its business relatively unmolested.

As a means for making sense of judicial empowerment, the balance-of-power explanation seems to hold up rather well. Still, a question remains: why was the judiciary *in particular* able to take advantage of Sudan's unstable and divided government? Why not some other state institution, like the civil service? Unlike the judiciary, the civil service enjoyed very little institutional independence during the 1956-1969 period, despite the fact that it was interacting with the same divided regimes. This is an important question, since it suggests that the balance of power explanation alone cannot account for an institution's trajectory under authoritarian or democratic rule. Massoud, for instance, has argued that the key difference between the judiciary and civil service was their method of decolonization. The former was "Sudanized" gradually and well in advance of national independence, giving Sudanese legal personnel ample time to hone their skills and adopt the professionalized outlook that would promote internal unity and discipline. Though Massoud does not state it, the implicit claim is that the civil service was Sudanized too rapidly and haphazardly, and that as a result it never matched the judiciary's internal coherence or political leadership.[19]

There are two reasons to doubt Massoud's explanation. First, there is a certain degree of question-begging to it, since the feature we are attempting to understand – the judiciary's ability to remain strong and cohesive during the late 1950s and 1960s – is itself explained as a product of the judiciary's strength and cohesiveness in the 1940s and early 1950s. Second, it is not at all clear that Massoud's implicit criticism of the civil service is accurate. As Heather Sharkey has shown, Sudanese bureaucrats, who shared tended to share a common demographic and educational background, carried out the vast majority of administrative work throughout the second half of the colonial period. Over that time, they displayed rapid professionalization and a deep commitment to the duties and privileges of their office. Indeed, it was the yawning gap between their growing competency and stymied job prospects that drove so many into the nationalist movement.

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[18] Massoud 2013, 94.
[19] Ibid, 95.

Moreover, Sudanization of the civil service became explicit colonial policy in the early 1940s, and Sudanese officials began to replace highly placed British officials near the end of the Second World War – right about the same time that Dardiri Muhammad Uthman became the first Sudanese High Court judge.[20] And since Sudanese bureaucrats were at the forefront of the nationalist movement, they quickly gained extensive exposure to and training in political tactics and leadership.[21] It seems unlikely, therefore, that the civil service could have been as ill prepared for decolonization as Massoud suggests.

A more promising explanation for the differing fates of the judiciary and civil service has to do with their rates of growth. Between 1956 and 1969, the number of judges grew very slowly, as it took some time to groom someone for the bench. This was not simply a matter of legal knowledge, though that alone was a major obstacle. It was also a matter of language competence, since the dominant language of the judiciary was English until well into the 1970s. Moreover, in order to prevent court packing, Sudan's constitutions limited the number of appointments that could be made to the judiciary without explicit legislative authorization.[22] As a result, by 1965/66, the judiciary employed just 240 personnel, including judicial administrators.[23] The civil service, on the other hand, grew unchecked and at an enormous rate following decolonization. In 1956/57, there were 15,868 classified posts in the central government; by 1968/69, that number had risen to 39,769.[24] When local service (i.e. provincial) posts are included, that second number swells to over 70,000, all in the space of thirteen years.[25]

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[20] It is worth noting that Sudanization of the bureaucracy's highest ranks (e.g. governors, district commissioners, and their immediate assistants) was delayed until the mid-1950s. In this respect, the civil service did lag behind the judiciary, which began appointing Sudanese to top positions in the Legal Department by the late 1940s. The delay was minimal, however, and does not diminish the enormous pool of talented Sudanese bureaucrats employed in senior positions elsewhere during the late colonial period. See Ahmed, R. H. (1987). *Central Personnel Growth in Sudan: 1955/56 - 1976/77*. Khartoum: University of Khartoum Press, 40.

[21] Sharkey, H. J. (2003). *Living with Colonialism: Nationalism and Culture in the Anglo-Egyptian Sudan*. Berkeley: University of California Press.

[22] See for example Chapter IX, article 94(3) of the National Charter, 1964. The Charter also sets a mandatory retirement age for judges, further retarding judicial growth.

[23] Ahmed, K. H. (1967). "Civil Service in a Changing Society: Proceedings of the 7th Round Table Conference." *Sudan Journal of Administration and Development* 3, 66.

[24] Woodward, P. (1990). *Sudan, 1898-1989: The Unstable State*. Boulder: Lynne Rienner Publishers, 118.

[25] Ahmed 1987, 45.

This growth had many causes, among them the habit of political parties to distribute public sector jobs as patronage.[26] Sudan's regimes also consciously associated increased bureaucratization with economic development, a belief they shared with many other Arab countries of the day.[27] Regardless of its causes, however, this rapid and uneven growth produced a far more diffuse and factionalized bureaucracy than had existed prior to decolonization.[28] In comparison, the judiciary was relatively unified both institutionally and ideologically. While divisions certainly existed, including the primary division between the Civil and Shari'a branches of the state judiciary, ultimate authority resided with the Chief Justice.[29] Ideologically, most judges subscribed to some form of legalism and shared a conception of law as a set of discrete rules designed to ensure just and efficient government. This homogeneity allowed the judiciary to act with a decisiveness and unity of purpose that few other major state institutions were able to match.

We are left, then, with a two-fold explanation for judicial independence and empowerment during the 1956-1969 period. On the one hand, a series of divided and unstable regimes was unable to constrain judicial actors, and in fact quickly grew reliant on those actors to carry out complex reforms. On the other hand, the judiciary owed its competence in navigating the political arena, as well as the attraction it held to the regime, to its own internal unity and coherence, themselves a product of institutional structure and ideological evolution. This second step is necessary if we are to explain why the judiciary *in particular* was the beneficiary of unstable government, as opposed to other state institutions. The balance-of-power explanation, therefore, must be placed within a historical and ideational context that can account for institutional behavior.

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[26] Ibid, 45-47.
[27] Ayubi, N. (1995). *Over-stating the Arab State: Politics and Society in the Middle East*. London: I.B. Tauris Publishers, 289-328.
[28] El Beshir, M. (1967). "Administration and Development: A Study of the Role of the Civil Service in Sudan," (PhD diss., UCLA), 52.
[29] Until November 1964, this position was occupied by Abu Rannat, who retired not long after General Abboud's overthrow. Abu Rannat and Abboud had been close personal friends, a fact that benefited the judiciary greatly at the time. Through the Chief Justice's adroit leadership and close control of his judges, the judiciary was able to weather Sudan's first period of authoritarian rule relatively unscathed.

II. The Judicialization of the Bureaucracy, 1964-1969

With the exception of parliament's 1966 showdown with the High Court over the expulsion of the Communist Party, none of Sudan's governments during the 1956-1969 period were willing to confront the judiciary directly. Behind the scenes, however, and especially during the second democratic interlude of 1964 to 1969, an indirect but nevertheless highly consequential battle quietly raged over the nature and scope of judicial power. The site of this battle was the civil service – that vast complex of government ministries, departments, commissions, and institutes that had, following decolonization, come to occupy such an outsized role within the Sudanese state. It may seem peculiar at first that the civil service should be the site of a conflict between regime and judiciary, but the bureaucracy's rapid growth had made it a key player in the country's politics, albeit a notoriously unstable one. As such, when the question arose of what role, if any, the judiciary should have in maintaining discipline and efficiency within the civil service, both judges and politicians took notice.

This struggle within the civil service is worth exploring for two reasons. First, it undermines any belief we might hold that Sudan's democratic governments were more respectful of judicial power and independence than its authoritarian ones. If anything, regime-judiciary relations actually worsened following Abboud's overthrow. For all his authoritarian tendencies, Abboud had always displayed a great deal of hesitancy about violating the rights and privileges of the judicial branch – a hesitancy that Sudan's democratic governments or subsequent authoritarian ones did not share. Second, the tactics used by the regime in the mid-1960s to weaken or limit judicial strength are strikingly similar to those employed by Numayri some ten years later. As such, the battle over the civil service, which has been almost entirely ignored in the scholarly literature, represents a crucial inflection point in the rise and fall of judicial power.

The Assault on the Civil Service

The context of this struggle is as follows. When the Abboud regime came to power in 1958, many in the civil service were initially very supportive, believing that a military government would provide the stability necessary for long-term planning and

policy implementation.[30] They soon discovered, however, that very few in the junta had any real experience in administration. One of regime's first tasks, therefore, was to install loyal officers in key bureaucratic positions. Some of these had fought alongside Abboud during the Second World War.[31] Many others were career civil servants with an eye for the main chance. Either way, the regime wasted no time in asserting its control. The Provincial Administration Act of 1960, which the reader will recall was designed by Abu Rannat, drained the central bureaucracy of much of its power. This was followed in 1962 by the Civil Service Pensions Act, which authorized ministers to forcibly "retire" any civil servant found to be politically unreliable. But most importantly, the Public Service Commission, a disciplinary body within the civil service meant to protect bureaucrats from precisely this sort of interference, was rendered silent through a mix of bribery, cajoling, and threats. Stripped of most of its powers and consigned to a purely "advisory" role, the Commission was unable to put up any sort of fight on the bureaucracy's behalf.[32] As one scholar describes it, the atmosphere between Abboud and the civil service was characterized by "mutual distrust, constant political intervention, and a politically inspired purge of a number of top-ranks of the civil service."[33]

When the Abboud regime fell in October 1964, therefore, the civil service had every reason to hope that it would fare better under democratic rule. Unfortunately, the public as well as many civilian political leaders had come to view it as complicit in the former regime's crimes. As a result, one of the first steps taken by the Transitional Government was to implement a bureaucracy-wide purge. Under the Unlawful Enrichment Investigation Act, which came into force in November of that year, a commission was established to investigate accusations of corruption. Very quickly, the mandate of the commission was expanded to include, in the words of Prime Minister Sirr al-Khatim al-Khalifa, any steps necessary to remold the civil service "into an effective tool for the service of the citizens in accordance with the requirements of a democratic

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[30] Draper, E. (1967). "The Ecology of Developmental Administration: The Sudan - A Case Study." (PhD diss., NYU), 116-117.
[31] Beheiry, M. (2003). *Glimpses from the Life of a Sudanese Public Servant*. Khartoum: M.O. Basheer Centre for Sudanese Studies, 109.
[32] Ahmed, R. H. (1974). *Critical Appraisal to the Role of the Public Service Commission in the Sudan, 1954-1969*. Khartoum: Institute of Public Administration, 7.
[33] El Beshir 1967, 228.

era, based on the principles of the sovereignty of the people and in conformity with the constitutional rights and the fundamental and intrinsic human rights…."[34] Under the first Mahjub administration, which replaced the Transitional Government in June 1965, the scope of the purge was expanded still further, and came to include anyone found to have "collaborated" with the previous regime – a charge that potentially implicated the entire upper ranks of the national bureaucracy.

Within the civil service, responses to this crisis were varied. Some believed that the regime's hostility was caused by its ignorance of bureaucratic norms and practices, and that relations would improve once the civil service returned to its neutral and apolitical roots.[35] Others argued that the time for neutrality had passed, and indeed that the entire distinction between political and administrative duties was no longer sustainable in modern Sudan.[36] The division fell largely along generational lines, with more senior bureaucrats counseling restraint and neutrality, and younger civil servants demanding a more aggressive strategy.

What Role for the Judiciary?

On one point, however, there was near unanimous agreement: the judiciary must intervene. If six years of military rule and a civilian-ordered purge had demonstrated one thing, it was that the civil service could not protect itself. All of the quasi-judicial institutions within the bureaucracy that were designed to protect civil servant rights (the Public Service Commission, departmental disciplinary boards, wage tribunals, etc.), had shown themselves to be helpless before the concerted might of the executive branch. During the second democratic interlude, therefore, a growing chorus of voices began demanding that oversight of the civil service be transferred from executive agencies to the judiciary. By incorporating the civil service's own quasi-judicial institutions into the

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[34] As quoted in Portugal, R. C. (1966). "Tenure and Discipline in the Public Service." *Sudan Journal of Administration and Development* 2: 65.
[35] Kheiri, O. (1966). " Max Weber wa al-Bīrūqrātiyya." *Sudan Journal of Administration and Development* 2: 37-48.
[36] Ahmed, G. M. (1967). Keynote Address in "The Civil Service and Political Change." *Sudan Journal of Administration and Development* 3, 16; El Tayeb, H. A. (1966). "The Role of the Administrator in Developing Countries: The Sudanese Case." *Sudan Journal of Administration and Development* 2: 59-78.

national judiciary – for instance, by mandating that the chairman of the Public Service Commission be a sitting member of the High Court of Appeal – the bureaucracy hoped to protect itself from regime interference.[37] One bureaucrat went so far as to argue that the government's purge was a violation of his "right to work". Since "the courts intervene every day to protect rights of property, they should therefore also intervene to protect the right to work." Properly understood, only "a legitimate judicial tribunal" was permitted to fire a civil servant, and only then after a full legal hearing.[38]

These demands were not as far-fetched as they might seem. In fact, during the colonial period, the civil service's Central Board of Discipline was presided over by the Legal Secretary. As Sudan neared independence, a report by the Terms of Service Commission recommended in 1951 that the new government maintain this link, perhaps by incorporating judges and magistrates into departmental disciplinary boards. Otherwise, it would be too easy for either the regime or the trade unions to dominate the civil service.[39] At the time, leading Sudanese politicians signaled that they would implement the report's recommendations, promising that legal officers would always have a place on the boards of discipline.[40] Somewhere in the process of decolonization, however, this link between judiciary and civil service was severed. In its place, seats on the various tribunals, panels and boards of discipline were distributed among union leaders, government-appointed ministers, and high-ranking bureaucrats. At the time, this step was defended on the grounds that judicial personnel lacked the bureaucratic experience to sit in judgment of the civil service. Its ultimate effect, however, was to prevent the judiciary from intervening in or influencing the development of the largest single institution in the Sudanese state.

While the governments of the second democratic interlude may have been too weak to roll back judicial power directly, they could take steps to contain it. That is why

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[37] Ahmed 1974, 11. Similar sentiments from Sudanese bureaucrats can be found in El Tayeb 1966, 74 and Portugal 1966, 65-66.
[38] Ali, Y.M. (1967). Panel Presentation in "The Civil Service and Political Change." *Sudan Journal of Administration and Development* 3, 24.
[39] Government of Sudan. (1951). *Report of the Terms of Service Commission*. Khartoum: Government of Sudan Press, 130.
[40] Government of Sudan. (1951). *Memorandum on the Report of the Terms of Service Commission*. Khartoum: Government of Sudan Press, 23.

when members of the civil service began clamoring for an increased judicial presence in the bureaucracy, the regime snapped into action. Two steps were taken, both of which would later be imitated by the Numayri regime to devastating effect. First, it preempted some of its greatest critics by restoring to the Public Service Commission and departmental disciplinary boards all the powers they had lost under Abboud, including powers over job training and employee discipline. New laws were passed as well to strengthen the Commission's investigatory authority in the event of internal disputes. And to reassure the civil service that the Commission would not be weakened again, its existence was enshrined in Chapter 10 of the 1964 Transitional Constitution, making it one of only six state institutions to be constitutionally recognized.[41]

Having established and empowered these quasi-judicial institutions, however, the regime immediately set about undermining their autonomy. The constitution guaranteed the Public Service Commission's independence, but was remarkably vague about what this would actually entail. Membership on the Commission was determined by the regime, which had exclusive rights to hire and fire as it saw fit. While customarily five members served at a time for three-year terms, both bench size and term limits were left entirely to the regime's discretion. Likewise with salaries and annual budgets. And while the regime argued that the inclusion of the Commission in the constitution was meant to shield it from political interference, it also had the consequence of shielding it from any *judicial* interference, effectively preventing judges from second-guessing the Commission's actions.

It is unknown whether the civil service would have ultimately been satisfied with its restored Public Service Commission and departmental disciplinary boards, since the second democratic interlude was overthrown by Numayri just a few years later. At the time of the coup, new legislation was being drafted that would have empowered these institutions still further, though without any accompanying increase in their independence. Still, there are signs that they were being met with some acceptance within the civil service, where they were described by their proponents as being far more efficient and flexible than the regular judiciary. The number of employee petitions heard

[41] The other five are the Supreme Commission, the cabinet, the legislature, the auditor general's office, and the judiciary.

by the Commission one year after its re-empowerment in 1965 was more than double what it was a year earlier. Similar increases were seen in the number of disciplinary cases, most of which were heard on appeal from departmental disciplinary boards. This at least *suggests* that quasi-judicial institutions were gaining traction within the civil service.[42]

Based on these events, a picture emerges of the regime's strategy to contain judicial power during the second democratic interlude. First, it created or empowered a parallel network of quasi-judicial institutions – that is, institutions that imitated the constitutional judiciary in their functions and procedures, but were not formally a part of it. These institutions were promoted by the regime as being a powerful, efficient alternative to the regular court system. At the same time, however, the regime constructed them in such a way that they would have very little independence. And since these quasi-judicial institutions enjoyed few protections at either the constitutional or statutory level, they quickly succumbed to regime pressure. Cases that might otherwise have found their way into the constitutional judiciary were channeled into quasi-judicial institutions instead, where they could be safely defused. Thus, by keeping these two institutional networks separate but parallel to each other, the regime was able to prevent the judiciary from expanding its power into the civil service.[43]

III. The Decline of Judicial Power, 1969-1976

Briefly summarizing this chapter thus far, I have argued that judicial power and independence reached their apogee during the 1956-1969 period. I attribute this outcome

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[42] Ahmed 1974, 27 and 31.

[43] Under Numayri, this parallel judicial network actually won a significant endorsement from one of the leading lights of the constitutional judiciary. In 1973, the regime coaxed out of retirement former Chief Justice Abu Rannat and convinced him to serve as chairman of the Employees Appeals Commission, the successor to the Public Service Commission following Numayri's coup. Under Abu Rannat's leadership, the Employees Appeals Commission heard roughly five hundred cases on appeal each year from departmental disciplinary boards, usually on matters pertaining to promotion, workplace infractions, and violation of tenure protections. Though many of these cases touched on matters of civil or criminal law (and therefore fell within the jurisdiction of the regular judiciary), no appeal of the Commission's decision was possible. Thus, Abu Rannat's participation as chairman, which lasted from 1973 until his death in 1977, helped to further establish the separation of judicial power from the civil service. See Vasdev, K. (1979). "Chief Justice Abu Rannat - An Appraisal." *Khartoum Law Review* 1, 143-146.

to two factors. First, the balance of power in Sudan undermined regime strength, leaving the country's rulers incapable of preventing the emergence of strong, independent state institutions. But not all institutions were able to take equal advantage of this balance of power – on the contrary, the judiciary seems more the exception than the rule. The second factor explaining judicial strength, therefore, is the judiciary's own institutional and ideological homogeneity. Because of its small size and internal unity, it was able to navigate the political landscape with a degree of success few other institutions were able to match. Moreover, the judiciary entered into the post-colonial period with a great deal of popular legitimacy and a reputation for efficiency, leading the regime to turn to judicial professionals whenever it faced complex or controversial policy decisions. Relations with the regime began to sour somewhat during the second democratic interlude (1964-1969), but judicial power as a whole remained relatively unchallenged. The most the regime could hope to do was to limit its spread, particularly in the civil service.

Beginning in 1969, however, the judiciary entered into a period of sustained executive retrenchment. The Numayri regime, which seized power in May of that year, was far more powerful than any of Sudan's other post-colonial regimes, including that of Abboud. As a result, it was willing to adopt a much more confrontational posture toward the judiciary. At the same time, the judiciary was undergoing its own internal crisis, as the very quality that had earlier been a source of strength – its small size –now became a major liability. Economic crisis and rising crime had left the judiciary facing an enormous case backlog. With accusations of inefficiency and incompetence hurled back and forth between regime and judiciary, public support for the legal system began to sour. In this context, Numayri implemented a series of major judicial reforms that inflicted enormous damage on the unity and internal coherence of the judiciary. These reforms include both alterations to the structure, sources, and procedures of the constitutional judiciary, as well as the creation of quasi-judicial institutions (e.g. state security tribunals, revolutionary courts, People's Local Courts). As a result, judicial power in Sudan became highly fragmented, undermining the judges' ability to mount an appropriate response to executive interference. These conditions set the stage for the "Judicial Revolution" of the late 1970s and 1980s.

The Emergence of a Strong Regime

The coup d'état that ended Sudan's second democratic interlude was carried out by a group of nine military officers and one civilian. Calling itself the Revolutionary Command Council (RCC) and styled after Nasser's Free Officers, the group claimed that its actions were prompted by the failures of Sudan's civilian governments, particularly their prosecution of the civil war. Importantly, the sole non-military member of the RCC, and the man chosen by Numayri to join him in addressing the public on the night of the coup, was former Chief Justice Babiker Awadallah. As a respected official who had personally borne the brunt of the civilian government's failures, Awadallah gave the coup a veneer of constitutional legitimacy; indeed, he was quickly appointed to the vice-presidency, and would go on to serve as prime minister and minister of justice as well before quitting politics all together in 1972. In those first unstable months after the coup, Awadallah's presence was key to winning the public's trust.

Of course, the regime was not afraid to resort to violence when necessary. Sadiq al-Mahdi was arrested in the days immediately following the coup, while the rest of the Umma leadership retreated to Aba Island, a citadel of the Mahdist movement. There they bided their time until the following March, when thousands of Ansar supporters flooded the streets of Omdurman in an attempt to overthrow the RCC. These protests were brutally suppressed, and with Awadallah's encouragement, Numayri ordered a full-scale assault on Aba Island. In the ensuing massacre, some 12,000 Ansar were killed, with many Umma leaders among the dead. Not long after, however, Sadiq al-Mahdi managed to escape from detention and into exile, where he would continue to plot against the regime. As for the rest of Sudan's civilian leadership, Muhammad Ahmad Mahjub suffered a debilitating heart attack in July 1969 and Ismail al-Azhari died of natural causes a month later.

Having ended the Umma threat, Numayri was now free to consolidate his control over the political left. The regime's primary constituency had initially been the Sudan Communist Party (SCP), and many communist leaders were appointed early on to key positions in the new government. Numayri was no ideologue, however, and his alliance with the SCP was purely tactical in nature. Biding his time until the Umma threat was

behind him, Numayri worked throughout 1970 to isolate pro-communist members of the RCC. Before he could deliver the fatal blow, however, a faction within the SCP and sympathetic military officers launched a coup of their own in July 1971. Numayri was imprisoned and the capital was captured, but the SCP's victory was short-lived. Army factions loyal to Numayri freed him from jail just three days later, while the SCP found its support limited to Khartoum and a handful of other cities. Nor were either Egypt or Libya willing to recognize the SCP government, having both recently suppressed pro-communist elements in their own countries. Isolated both at home and abroad, the SCP government quickly fell. Just three days after the coup was launched, Numayri returned to power.

The following five years, from 1971 to 1976, are remembered now as the high point of Numayri's rule. All of his political opponents in the north had been vanquished, leaving him free to turn his attention to economic development and relations with the south. Historian Robert Collins has referred to this period as "The Heroic Years,"[44] while Mansour Khalid, a regime insider who served for a time as Numayri's Minister of Foreign Affairs, has described it as "The Years of Promise".[45] It was a period of economic growth, infrastructure development, and remarkable political achievements. Gulf countries, flush with cash following the 1973 oil crisis, invested heavily in Sudanese agriculture, leading to the construction of new canals, plantations, and factories for processing sugar and cotton. Important improvements were also made to the country's aging railroads and ports, and new telecommunications networks were installed in the cities.[46] By 1978, development expenditure in Sudan reached £S186 million, having grown from just £S17 million in 1970.[47] In keeping with past Sudanese political practice, the beneficiaries of this investment were overwhelmingly northern towns and cities, but

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[44] Collins 2008, 94.
[45] Khalid, M. (1985). *Nimeiri and the Revolution of Dis-May*. London: Kegan Paul International, 26.
[46] Nimeri, S. (1977). *The Five Year Plan (1970-75): Some aspects of the Plan and Its Performance*. Khartoum: Development Studies and Research Centre.
[47] Medani, K. M. (2003). "Globalization, Informal Markets and Collective Action: The Development of Islamic Ethnic Politics in Egypt, Sudan and Somalia." (PhD diss., University of California, Berkeley), 160.

so great were the amounts involved that even those residing in the countryside saw their standard of living improve.[48]

The regime's greatest achievements, however, were political in nature. First, Numayri negotiated a peace agreement with the south, culminating in 1972 with the signing of the Addis Ababa Accord. In part, Numayri's decision to end the civil war and agree to southern autonomy sprang from a place of weakness. Having broken with the SCP a year earlier, the regime was eager to find new supporters in the south. Moreover, the Anya-Nya had just won military and financial backing from governments in Uganda and Israel, significantly eroding the north's traditional military advantage.[49] Yet the only reason Numayri felt confident in entering into negotiations with the south was because his control over the officer corps was so complete. Nor were the other northern political parties in any condition to object, as the regime used its control over the Sudanese Socialist Union (SSU), the country's only sanctioned political organization, to effectively monopolize the public sphere. Ending Sudan's first civil war, therefore, was only possible because of the strength and internal coherence of the Numayri regime.

The second major achievement of the regime was the signing of the 1973 Permanent Constitution, a landmark document in Sudanese political history. Having resolved the southern crisis, Numayri was now in a position to replace the 1956 Transitional Constitution with something better suited to Sudan's needs. Debate quickly came to center on the question of religion – specifically, whether the constitution should explicitly acknowledge *shari'a* as the principle source of legislation. Hassan al-Turabi and other former members of the ICF (which had been dissolved along with all other political parties after the coup), were major proponents of such a clause. However, partly in deference to southern concerns and partly due to Numayri's own ambivalence on the issue, the constitution was ultimately a very secular document. Yet the role of *shari'a* remained very much at the forefront of public debate, and would resurface again and again throughout the 1970s. Other provisions in the constitution, including guarantees of

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[48] On patterns of regional investment in the early post-colonial era, see Young, A. (2014). "Measuring the Sudanese Economy: A Focus on National Growth Rates and Regional Inequality, 1959-1964." *Canadian Journal of Development Studies* 35(1): 44-60.

[49] Johnson, D. (2011). *The Root Causes of Sudan's Civil Wars: Peace or Truce*. Suffolk: James Currey, 36.

judicial independence and the rule of law, were frequently ignored by the regime, particularly in the late 1970s. Yet despite these deficiencies, the signing of the Permanent Constitution was a pivotal moment in Sudanese history. Together with the (temporary) resolution of the civil war, it earned Numayri international acclaim and widespread domestic goodwill.

From 1969 to 1976, therefore, Sudan was ruled by a far more powerful regime than any it had experienced before. Some of this was due to luck: Numayri had the good fortune of being in office during the Gulf oil boom, which led to massive foreign investment in the Sudanese economy. Likewise, the regime happened to seize power just as the first generation of post-colonial elites was passing from the scene, leaving the traditional parties especially vulnerable. Other causes of regime strength, however, were the consequence of careful design. As an explicitly non-sectarian (and after its break with the SCP, non-partisan) government, the regime was able to appeal to a much larger swath of the population than Sudan's civilian governments had been. With the aid of the SSU, Numayri succeeded in developing a broad base of support throughout civil society, including the press, the business community, and in the countryside. Finally, his resolution of the civil war won him a new constituency in the south, brought him international acclaim, and ensured his control over the military. As a result, the crises that had brought down Ibrahim Abboud posed little threat to Numayri. In retrospect, we can see how unstable his successes really were. At the time, however, many believed that the country had at last turned a corner and was now heading toward a much brighter future.

Reforms to the Formal Judiciary: Establishing the Civil Law

This resurgence in regime strength tilted the prevailing balance of power in Sudan decisively against the judiciary, which up till then had been the beneficiary of a fractured political arena. During the first seven years of Numayri's rule, therefore, the regime embarked on a program of wide-scale judicial reform that strained the regime-judiciary relationship to its breaking point. There were two main categories of reforms: (a) those that altered the basic structure and ideology of the formal judiciary; and (b) those that established quasi-judicial institutions that operated independently of the formal judiciary.

The first round of reform, which was largely spearheaded by Awadallah, took as its target the formal judiciary. Immediately after the May Coup, all seven members of the High Court were fired and replaced with judges more sympathetic to the regime's goals. Next, Awadallah convened a law commission charged with examining and proposing major changes to Sudan's legal system. This commission, which first met in 1971, consisted of twelve Egyptian lawyers, a state counsel from the Ministry of Justice, two Sudanese judges of the First Grade, and one *qāḍī*.[50] As its outsized Egyptian presence suggests, the commission was chiefly interested in bringing Sudan's legal system into greater conformity with that of Egypt. Since Sudan stood virtually alone among Arab countries in its use of common law, this meant adopting some form of civil law, a titanic shift in the country's legal tradition.

For Numayri, however, the shift from common to civil law was simply a continuation of the May Revolution, which was itself part of a larger process of national decolonization:

> Our Revolution broke out to free this people politically, economically, socially, culturally, and legally…. Emanating from this conception, it was the duty of our Revolution to add to its victories in various fields of activities a new victory in the legal field[,] which is represented in a comprehensive legislative revolution to draft a total legal index, emanating from the inheritance of this Arab Moslem people, complying with their aspirations to accomplish for them true sovereignty and total independence, and to accompany the trends of the modern legislation. Thus the law will be familiar with the life of the people and will embrace the national life, which will link it with its surroundings and which will prove its originality and essence.[51]

The motivations for the shift to civil law are difficult to disentangle. According to Massoud, Awadallah was primarily interested in establishing stronger relations with Egypt, and saw legal reform as the best means of doing so.[52] For Numayri, on the other

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[50] Mustafa, Z. (1973). "Opting Out of the Common Law: Recent Developments in the Legal System of the Sudan." *Journal of African Law* 17(2), 135.
[51] Numayri's full remarks can be found in "Numayri Urges Revolution in Sudanese Laws," *The Sudan News*, January 9th, 1970, p. 4.
[52] Massoud 2013, 107.

hand, the chance to oversee the construction of a new legal system may have appealed to his desire to leave a lasting political legacy. Intriguingly, the adoption of civil law would also have permitted the country to recruit judges and lawyers from Egypt, a practice pioneered by the Shari'a branch of the judiciary many decades earlier. At the time of these reforms, the Sudanese civil judiciary was serving a country with a population of close to fifteen million, but employed only about five hundred lawyers and even fewer judges.[53] Since the use of Sudanese common law represented a sort of barrier to the recruitment of foreign legal professionals, Numayri's decision to transition to the civil law may have been an attempt to reach some solution.

Eight months after the commission began its work, it produced the Sudan Civil Code of 1971. Across 917 sections, Sudan's first code of civil law discussed matters of property rights, legal contracts, obligations, and the nature of legal personality and corporate liability. It was also, as one observer has caustically noted, largely a reproduction of the Egyptian Civil Code of 1949, with relevant proper nouns and adjectives changed to reflect the Sudanese context.[54] Soon after, it was joined by the Civil Procedure Code (1972), the Civil Evidence Code (1972), and draft copies of a commercial and criminal code. As with the Civil Code, these other codes were heavily indebted to their Egyptian equivalents, with some influence as well from Libyan, Syrian, and Kuwaiti sources. The planned abrogation and replacement of the Sudanese Criminal Code was a particularly drastic step, since it was the oldest and far and away most widely known of the country's legal codes.

The draft commercial and criminal codes were never completed, however, because Numayri's first round of judicial reform soon collapsed under its own weight. Members of the judiciary rose up in opposition, arguing vociferously in the press that the adoption of civil law would bring Sudan's already notoriously slow justice system to a grinding halt. How could a judge be expected to interpret the law when his entire legal training and over seventy years of accumulated professional expertise had just been rendered obsolete? Few lawyers or judges had any substantive knowledge of civil law

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[53] Mustafa 1973, 141.
[54] Mustafa, Z. (1971). *The Common Law in the Sudan: An Account of the 'Justice, Equity, and Good Conscience' Provision*. Oxford: Clarendon Press, 137.

terminology or techniques, save for a small number of graduates from Cairo University-Khartoum Branch. Moreover, much of the legal infrastructure in the country (e.g. law libraries) was no longer suitable for use. Finally, since the new codes were being published exclusively in Arabic, millions of southerners and other non-Arabs were confronted by a body of laws they did not understand and could not practice. As resentment grew, many judges chose to simply ignore the new codes all together, or else defer judgment until the codes could be studied more closely. The resulting work slowdown created long delays in the administration of justice.[55] Within two years, Awadallah and Numayri were forced to back down. A new law commission was created, this time staffed entirely by Sudanese legal professionals, and the country quickly reverted to common law.

Quasi-Judicial Reforms: State Security Courts and People's Local Courts

The fact that the regime was willing to attempt such a sweeping transformation of judicial structure and procedure shows that under Numayri, the historical hesitancy within the executive to interfere in judicial affairs had evaporated. Still, the civil law experiment's failure proves that the judiciary was still capable of resisting executive interference, provided it acted with sufficient unity. The next round of judicial reform, therefore, bypassed the formal judiciary all together and constructed instead a parallel judicial network. By establishing quasi-judicial institutions, the regime was able to fragment judicial authority, undermine judicial unity, and gradually shift the caseload to more pliable legal professionals.

The earliest of these were the State Security courts, which owe their origins to the period immediately following the May Revolution. During those first unstable months, the new regime established a series of special revolutionary courts, staffed by members of the RCC, to try former government officials for corruption and abuse of office. For the judiciary, however, these courts raised numerous red flags. First of all, with the exception of Awadallah, none of the RCC had any formal legal training. Moreover, while the trials themselves were conducted in public and purported to guarantee to the

[55] Mustafa 1973, 144.

accused his or her civil rights, they did not feature the same sort of protections or procedural safeguards provided for under the (then-suspended) 1964 Transitional Constitution. Unsurprisingly, the courts' verdicts tended to be extremely punitive, including long prison sentences, forfeiture of political rights, monetary fines, and confiscation of property.[56]

While the revolutionary courts themselves were short-lived, their basic layout was replicated just a few years later in the form of State Security courts. These special courts, which were convened under the State Security Act of 1973 and presided over by military officers, were originally designed to handle cases involving political crimes or threats to the security of the nation, particularly following an attempted coup in 1975.[57] Over time, however, their jurisdiction grew to include the crime of attempting to "sabotage the national economy". It was on this charge, for example, that a State Security court tried the director and deputy director of the Cooperative People's Bank in November of 1976. They were accused of defrauding the bank of more than a million pounds, a crime that, according to the Prosecutor General, risked undermining the confidence of depositors and retarding the country's development.[58] Such reasoning became increasingly common in the mid-1970s, as the government grew eager to combat a burgeoning black market. And unlike with the civilian judiciary, the State Security courts permitted a much greater role for the executive branch. Prosecutors had to receive the permission of the President of the Republic before any charges could be filed, at which time he could also stipulate any special procedures to be followed during the trial. Moreover, the final verdict was sent to the President prior to publication, at which point he could confirm, commute, or reverse the sentence. Only then was it publicly announced, without any indication of what the President had ordered. Certain other evidentiary rights, guaranteed in the civilian judiciary, were also absent in State Security courts. Throughout, the emphasis was on

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[56] Khalid 1985, 27-30.
[57] In conjunction with charges levied under the State Security Act, these State Security courts could also hear separate charges stemming from violations under the Sudanese Penal Code and other statutory acts. And if a single crime was punishable under multiple legal codes, the one with the strongest sentence was to be applied.
[58] "SP1m. fraud trial," *Sudanow* November 1976, p. 17.

political and security considerations, meaning that the rights of the defendants were rarely given much weight.

The other major quasi-judicial institutions to be established during this period were magistrate benches and the People's Local Courts. These institutions were the successors to the Native Courts discussed in Chapter Two, which had come under siege almost immediately after Numayri's coup. First, their administrative powers were transferred by the Ministry of Local Government to the newly-formed People's Councils. Then, with the blessing of the Chief Justice, they were stripped of their judicial powers as well and replaced by local magistrates. These magistrates, who served twelve to a bench and were selected on the basis of their loyalty to the regime, tended to have little (if any) formal legal training. The law they applied was a mix of local custom and the Sudanese criminal code, balanced by a commitment to "general equity". In addition to their role as judges, magistrates also exercised considerable police and prosecutorial authority. This meant that the same person who investigated a crime and charged a suspect could also preside over his trial.[59]

These benches quickly filled the void left by the end of Native Administration. Between 1969 and 1971, the number of magistrate benches grew from just four to 422, while the number of Native Courts shrunk from 710 to 106.[60] Magistrate benches also assumed an enormous share of the total number of legal cases in Sudan. Because of their procedural flexibility and ability to intervene at multiple points in the judicial process, they were also able to decide cases much more quickly and inexpensively than the civil judiciary ever could. Accurate data on the number of cases heard each year is difficult to locate, but according to one study, the magistrate benches decided 188,201 cases in 1973, nearly twice the number decided by the Civil and Shari'a branches of the judiciary combined.[61] This suggests that they assumed almost all of the cases previously heard by

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[59] El-Na'im, A. A. (1978). "The Many Hats of the Sudanese Magistrate: Role Conflict in Sudanese Criminal Procedure." *Journal of African Law* 22(1): 50-62.
[60] Salman, S. M. A. (1983). "Lay Tribunals in the Sudan: An Historical and Socio-Legal Analysis." *Journal of Legal Studies* 21, 102.
[61] Ibid, 105.

native courts in the North, which had been handling the majority of cases since independence.[62]

This speed, however, came at a serious cost in corruption and incompetence, which manifested itself in the form of a very high appeal rate.[63] Much of the efficiency gained through these courts was therefore lost by further delays at the appellate level. It was for this reason that the government abolished these benches in 1976 and replaced them with the People's Local Courts. The main difference between the People's Local Courts and the benches of magistrates they replaced had to do with the way judges were appointed. Under The People's Local Courts Act of 1976, the process became even more politicized, as members of the court were selected by a mix of regional administrators, the leader of the local branch of the SSU, and the local Security Officer. The final appointment had to be made by a provincial judge, but only after local elites had presented him with a list of acceptable candidates.[64]

Explaining the Weakness of the Judiciary's Response

In retrospect, the period from 1969 to 1976 marks a time of enormous judicial upheaval. The Numayri regime, which was much stronger than any of its post-colonial predecessors, implemented a series of major reforms to the structure, procedure, and source materials of the judiciary. First, it launched a pre-emptive strike on the High Court, clearing the entire bench and replacing it with regime loyalists. Second, it attempted to shift the very basis of Sudan's legal system from common to civil law. Though this experiment with civil law only lasted for two years, it nonetheless represents a massive instance of executive interference in judicial affairs. Not since the dismantling of the Mahdiyya by the British in 1898 had a government in Sudan launched such a brazen attack on judicial independence. This was followed by the creation of a parallel

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[62] Thompson, C. F. (1966). "The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan." *Wisconsin Law Review* Fall: 1146-1187.
[63] Abdul-Jailil, M. A. (1985). "From Native Courts to People's Local Courts: The Politics of Judicial Administration in Sudan." *Verfassung und Recht in Übersee* 18(2), 147.
[64] Abu Shouk, A.I. (2002). "Native Courts at Work: A Case Study from Dār Bidayriyya in the Sudan," *Access to Justice: The Role of Court Administrators and Lay Adjudicators in the African and Islamic Contexts*. C.J. James-Pauly and S. Elbern. The Hague: Kluwer Law International, 95-96.

judicial network, one consisting of quasi-judicial institutions more susceptible to regime manipulation. In addition to establishing the State Security courts, the regime also replaced Native courts with magistrate benches and the People's Local Courts. In both instances, these quasi-judicial institutions offered defendants fewer rights, had less independence from the executive branch, and detracted from the internal coherence and unity of the formal judiciary.

All of this raises the question of why the judiciary was unable to successfully resist or forestall these reforms. Part of the explanation has already been discussed above in our analysis of the prevailing balance of power. Unlike Abboud or Sudan's civilian leaders, Numayri presided over a comparatively unified and popular regime. By the late 1970s, his position would be greatly undermined, but at least initially he was able to mount a much more aggressive and coherent attack on the courts than any of his predecessors. But this focus on the regime's strength only tells half the story. The other half involves the weakness of the judiciary itself, which had found that much of the goodwill and internal unity it had cultivated during the 1950s and 1960s had evaporated.

Ironically, the source of the judiciary's weakness was the very quality that had once been its greatest strength: its small size. Economic growth in the 1970s had brought with it increased crime, rising inflation (which created a thriving black market), and governmental corruption. As a result, Sudan's judges were burdened with a rapidly expanding docket, even as the total number of judges remained relatively constant at around five hundred. Accurate numbers from this period are difficult to locate, but a snapshot from the late 1970s provides a sense of the problem's scope. In 1978, 89,595 civil and criminal cases were heard by the civil judiciary, but only 42,399 decisions were rendered.[65] And even though the volume of cases heard in 1977 was nearly one-third greater than in 1968, the number decided annually actually dropped over the same period of time by twelve percent in civil cases and nine percent in criminal cases.[66] It was not at all unusual for a case to languish in court for two years or more, or for a defendant to arrive in court on the appointed day only to find that his case had not been scheduled or

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[65] "Too many chiefs and not enough judges," *Sudanow*, September 1980, p. 11-12.
[66] Ibrahim 2008, 249 n28.

his case files misplaced. For instance, of some eight hundred high profile corruption cases begun in 1975, only fifty-one had been decided by 1982.[67]

Some small attempts were made by the judiciary to address these problems, but none with any lasting success. For instance, in 1974, the government established the University of Juba, which had a law school equipped to train and graduate legal professionals. Together with the law faculties at University of Khartoum and Cairo University-Khartoum Branch, the number of lawyers did increase over the decade, but so did the exodus of lawyers to Gulf countries, where legal professionals could secure better pay and superior working conditions. In 1979, for example, fourteen graduates of the University of Khartoum were appointed to judgeships, but only four would still be sitting on the bench a year later; the other ten either resigned or joined the Attorney General's chambers. This brain drain of legal personnel robbed Sudan of many of its brightest and most talented legal professionals, further undermining judicial strength at a time of continual regime assault. Additional steps were taken via Provisional Order, including a 1979 move by Numayri to raise the age at which judges could retire with a full pension from twelve years of service to twenty-five.[68] By the end of the decade, however, the number of civil judges stood at 517, virtually unchanged from what it was at its start – and this in spite of the explosion in crime rates throughout the country.[69]

It is little wonder, therefore, that the civil judiciary became the target of popular outrage and public criticism, including in popular jokes, short stories,[70] and in at least one Presidential Address. Speaking before the Judicial Conference of 1974, Numayri began by affirming the principle of judicial independence as "the cornerstone of our constitutional institutions." Recent years, however, had brought to his attention certain worrisome trends:

> Firstly, undue delay in deciding civil and *shari'a* cases. One would wonder why it should take the court three or four years to decide a civil

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[67] Kameir, E.W. and I. Kursany. (1985). *Corruption as a 'Fifth' Factor of Production in Sudan*. Uppsala: Scandinavian Institute of African Studies, 14.
[68] "Law and Orders," *Sudanow*, May 1979, p. 23.
[69] "Too many chiefs and not enough judges," *Sudanow*, September 1980, p. 11-12.
[70] Ali El Mekk, "The Case," *Sudanow*, July 1978, p. 64-67

> suit. Sometimes it might take more, and in this manner cases fade away and claims become equivocal. This is shameful, and it should be avoided by remedying such shortcomings that might hinder speedy hearing of civil suits. This should be regarded in personal cases, as well as in appeals, that have a direct impact on individuals. Secondly, laxity in deciding criminal cases. The number of those remanded in custody have multiplied, but it is unlikely that an accused person should remain in custody without due trial….Thirdly, their Honors the Judges and all workers in the legal profession alike with government officials, should pay attention to punctuality, respect people's feeling and interests, and decline any disgraceful act, for law is the foundation of a sound society, the pillar of communal life, and the safeguard of stability and progress.[71]

Concerns about judicial inefficiency and morality became a familiar refrain in regime rhetoric. Indeed, the creation of State Security courts and magistrate benches was justified on precisely the grounds that they would speed the course of justice. In this environment, it became very difficult for the judiciary to articulate a defense of its traditional prerogatives, since the status quo had become so patently dysfunctional. Meanwhile, all of the judges' normal means of resisting state interference (e.g. strikes, work slowdowns, resignations) only worsened the case backlog, further damaging their reputation and undermining their position. In the face of such criticism from the regime and civil society groups, judicial unity and ideological homogeneity began to disintegrate. Even the new Chief Justice, who had been handpicked by Awadallah for his sympathy to regime interests, was sharply critical of his colleagues, refusing to extend to them the same degree of support they had received from his predecessors. By the late 1970s, the judiciary found itself at the weakest point in its history, abandoned by many of its institutional allies and isolated from civil society. As we shall see in Chapter Five, these concerns about judicial efficiency and speed grew even more salient as the decade wore on. Indeed, they would ultimately become one of the primary justifications for the Judicial Revolution of the 1980s, in which Numayri transformed the State Security courts into "Courts of Prompt Justice" (*maḥākim al-'adāla al-nājiza*).

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[71] Government of Sudan. (1974). "The President Addresses the Judicial Conference," Omdurman: Ministry of Culture and Information Printing.

IV. Conclusion

Reflecting on the 1956-1976 period, several lessons emerge regarding regime-judiciary relations. First, judicial strength and independence were determined both by the prevailing balance of power and the judiciary's own internal unity. For the first thirteen years following decolonization, it benefited from a string of weak and unstable regimes, all of which were more likely to regard judges as potential allies to be courted than rivals to be challenged. Relations with the regime only began to decline during the second democratic interlude, when Sudan's civilian leaders sought to counter the diffusion of judicial power into the civil service. Relations worsened even further following Numayri's coup in May 1969. As Sudan's strongest post-colonial regime to date, it was willing to aggressively confront judicial power and independence where it felt necessary to do so, especially as a growing case backlog began to damage the courts' popularity. By establishing quasi-judicial institutions that *resembled* the formal judiciary but lacked many of its protections from executive interference, the regime was able to gradually undermine judicial unity and ideological homogeneity.

Contrary to what might be expected, Sudan's democratic and civilian governments were no more likely to respect principles of judicial independence and separation of powers than its authoritarian ones. Indeed, arguably the best period for regime-judiciary relations occurred during the reign of Ibrahim Abboud, only to decline precipitously following his replacement by a civilian government during the second democratic interlude. While the judiciary undoubtedly suffered the most under Numayri, the Abboud period stands as a stark reminder that not all authoritarian rulers were willing or able to trample the independence of the judicial branch. Likewise, the decision by the Umma government to ignore a direct judicial order to reinstate the Communist Party reveals a remarkable lack of commitment to the principle of separation of powers. A second key insight from this period, therefore, is that there is no evidence to suggest that judicial power and independence in Sudan fared better under democratic rule and worse under authoritarianism.

Third and lastly, the Judicial Revolution of the 1980s was in many ways a continuation of the reforms begun in the 1960s and 1970s. First under the civilian governments of the second democratic interlude, and then again by Numayri in response

to judicial inefficiency, we find Sudan's regimes using quasi-judicial institutions as an alternative to the traditional class of legal professionals. These institutions are the direct predecessors of the Emergency Courts and Courts of Prompt Justice that the regime would establish after 1980. And in another act of foreshadowing, we can find in the regime's forced imposition of civil law the same ambitions toward systematic reform that would lead it to implement Islamic law in 1983. In both cases, Numayri and his supporters identified judicial reform as a means of increasing judicial efficiency, securing foreign alliances, and managing popular dissent. Thus, while the Judicial Revolution discussed in the next chapter marks a genuinely transformative moment in Sudanese political history, it is in many ways also a continuation of strategies developed years earlier.

CHAPTER FIVE: ISLAM, STATE POWER, AND THE 'JUDICIAL REVOLUTION', 1977-1985

Introduction

The previous chapter discussed the years from 1956 to 1976, a two-decade period during which judicial power and independence in Sudan reached their greatest height, only to collapse amidst petty factionalism, procedural incompetence, and a resurgent regime. The judicial reforms explored in the current chapter, which covers the period from 1976 to 1985, represent in some ways a point of continuity. Considering Numayri's attempts to shift Sudan's legal system from common to civil law during the first half of his regime's rule, the judicial reforms of its second half are not out of character. One can find in his thinking many of the same concerns and assumptions present throughout his period in power.

Nevertheless, the ambition and durability of the judicial reforms carried out in the late 1970s and early 1980s warrant special attention as a key moment in the country's history. Though no more sweeping in their scope than the forced adoption of civil law, the reforms of this later period were much longer lasting, and indeed continue to shape the course of judicial behavior and politics in Sudan today. Included in these were the infamous "September Laws", so named after the month in 1983 in which they were first introduced. These laws were designed to bring the nation's legal codes into conformity with *shari'a*, and while they were not the first law codes in Sudan to claim this as their goal, they were by far the most ambitious. They, along with the many other waves of reform that broke upon the legal system during this period, mark a titanic shift in the structure, personnel, sources, and procedures of the state judiciary, and are popularly remembered now as setting Sudan on its course toward becoming the world's "First [Sunni] Islamist Republic".[1]

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[1] Gallab, A. A. (2008). *The First Islamist Republic: Development and Disintegration of Islamism in the Sudan*. Aldershot: Ashgate.

The purpose of this chapter is to understand precisely the reasons for and nature of those reforms – the series of rapid judicial innovations that began in the late 1970s and culminated in 1984 with the establishment of enormously powerful "Courts of Prompt Justice" (*maḥākim al-'adāla al-nājiza*) across the country. Specifically, this chapter seeks to answer the following three questions: (1) Why were these reforms attempted; (2) What sorts of sources, methodologies, and theories did they introduce; and (3) What impact did they have on the power and independence of the judiciary?

Taking these questions in order, it reaches the following conclusions. First, the regime reformed the judiciary both as a way of winning the support of the country's Islamist movement and in order to streamline judicial procedure, rendering the courts more responsive and efficient. Because of mounting economic and political challenges, Numayri was eager to ally himself with the Islamic Charter Front (ICF), Sudan's main Islamist movement. The price of that alliance, however, was the unification of the country's judicial system and an end to the division between its civil and Islamic judiciaries. Furthermore, a close analysis of his and ICF leader Hassan al-Turabi's thought reveals that both men also believed that a judge permitted to apply *shari'a* would also be a far more efficient and effective judge. This is because a legal system based on *shari'a* would more closely track people's basic moral intuitions and desires, eliminating the gap between the demands of the state and the needs of the citizenry. Thus, the decision to reform the judiciary emerged both of political concerns and a series of beliefs and assumptions about the nature of law, and cannot be reduced to a simple expression of rational self-interest. This explanation illustrates the basic insight first discussed in Chapter One and then applied to earlier instances of judicial reform in subsequent chapters: any explanation for the nature of regime-judiciary relations must account for the historical and ideational context in which regime decisions are made.

Second, these reforms arrived in three main waves. In the first wave, the eighty-year division between the civil and Islamic branches of the judiciary was ended, unifying the country's judiciary into a single administrative unit and profoundly reshaping the way secular and religious law were experienced in Sudan. In the second wave, this administrative unity was matched by a textual and procedural unity, as the September Laws were gradually introduced over the course of 1983 and early 1984. Finally, in the

third wave, the regime announced a constitutional state of emergency. Under the terms of this emergency, special "emergency courts" were created and authorized to dispense a rough, immediate form of justice. When these courts were incorporated into the regular judiciary in 1984, they brought with them a practice of swift, decisive judgment. Indeed, they were known at the time as "Courts of Prompt Justice."

Third, these reforms represent above all else an act of judicial empowerment and independence. Though few in the regime could have fully foreseen their effect, they ultimately endowed Sudan's judges with a whole host of new powers, privileges, and resources that no judge had enjoyed since the collapse of the Mahdiyya. Perhaps most important among these was a judge's right to resort to the "uncodified *shari'a*" in his decision-making, thereby placing in his hands the power to access and introduce into law whichever legal postulates he thought necessary based on his understanding of the Islamic legal tradition, regardless of the will or intent of the regime. In a manner echoing the policy of "strategic ambiguity" adopted by the colonial regime during the period of Native Administration (see Chapter Two), these reforms allowed the judiciary to wield its powers in innovative and (for the regime) unforeseeable ways. Thus, while many judges experienced Numayri's reforms as a period of sustained executive assault on the principles of judicial power and independence, they were in many ways also an enormous expansion of the courts' power and autonomy. The contradictory nature of these reforms is one of their primary legacies for the Sudanese legal system, and to this day continues to influence the country's politics.

The structure of this chapter roughly tracks the three separate questions posed above. The first section explains the origins of Nuamyri's judicial reforms through the collapse of regime strength and the rise of Turabi and the Islamic Charter Front. It also explores some of the ideological trends present in Turabi and Numayri's thinking, and links them to the causes and nature of the regime's reforms. Sections Two, Three, and Four chart the deployment and impact of the three successive waves of reform, including the unification of the judiciary, the implementation of the September Laws, and the creation of the emergency courts. Finally, I conclude by analyzing the legacy of these reforms and evaluate the extent to which they expanded or undermined judicial strength and autonomy in Sudan.

I. The Causes and Contexts of Judicial Reform

To understand why the regime chose to implement such sweeping and ambitious judicial reforms, it makes sense to begin with the explanation offered by Numayri himself. His fullest account of the matter can be found in his two semi-autobiographical works, *al-Nahj al-Islāmī, Limādhā?* (The Islamic Path, Why?)[2] and *Al-Nahj al-Islāmī, Kayfah?* (The Islamic Path, How?).[3] In these volumes, Numayri explains that for many years he never gave much thought to religion. His transformation from ardent socialist to impassioned religious reformer happened gradually, as he slowly came to appreciate how much injustice was being carried out in Sudan in his name. One memory in particular, of a child's shoe left abandoned in the dust after her parents' home was confiscated by the regime, stood out for Numayri as a turning point in his thinking.[4] From that day forward, he became obsessed with the question of justice, ultimately rejecting socialism and embracing the Islamic path instead.

Many scholars are understandably skeptical of this explanation for Numayri's decision to implement *shari'a*, not least because his memoirs are generally assumed to have been ghostwritten.[5] Mansour Khalid, for example, dismisses the possibility that Numayri was in any way motivated by his faith, largely on the grounds that had he actually been religious, "he would have spent the rest of his life tortured by his conscience rather than continuing the torture of others." He was, moreover, far too calculating a politician to be a true believer, since "a religious fanatic is a person blinded by his faith; he does not weigh the consequences of his actions."[6] Likewise, the Sudanese political scientist Abdel Salam Sidahmed declares that "the reasons behind such a dramatic and daring step as the *shari'a* application should be sought not

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[2] Numayri, J. M. (1980). *Al-Nahj al-Islāmī, Limādhā?* Cairo: al-Maktab al-Misri al-Hadith.
[3] Numayri, J. M. (1984). *Al-Nahj al-Islāmī, Kayfah?* Cairo: al-Maktab al-Misri al-Hadith.
[4] Numayri 1980, 291.
[5] In fact, Numayri "wrote" a number of books during the second half of his rule, including a volume on the life and accomplishments of Anwar Sadat and an analysis of Africa's place in the Cold War. See Numayri, J. M. (1981). *Al-Sādāt: al-Mabādi' wa al-Mawāqif*. Cairo: Al-Maktab al-Misri al-Hadith; and Numayri, J. M. (1983). *Ru'iyya al-Istrātījiyya Limuhaddidāt al-Amn al-Qawmī fī al-Sharq al-Awsaṭ fī Thamānīnāt.* Cairo: Al-Maktab al-Misri al-Hadith, respectively.
[6] Khalid, M. (1985). *Nimeiri and the Revolution of Dis-May*. London: KPI, 255.

in…ideological overtones but rather in the political circumstances – that from [Numayri's] viewpoint – necessitated such a choice." It is the case, therefore, that with "varying emphasis it may be commonly agreed that [Numayri] had political motives for the *shari'a* declaration," and not ideological ones.[7]

Though these scholars are surely right to be skeptical, it may be the case that the distinction between political and ideological motives is not as clear-cut as they suggest. In all likelihood, both played a role in Numayri's decision to implement Islamic law, in part because Numayri's perceptions about risk and reward were structured by his beliefs about the nature of law. In this section, I attribute the regime's decision to reform the judiciary to two causes: (1) The desire to win the support of the increasingly powerful Islamist movement in Sudan, specifically the ICF and its leader Hassan al-Turabi; and (2) An interest in making the judiciary more efficient and effective, particularly in light of the mounting case backlog discussed in Chapter Four. Taking these two causes in turn, I first explore the changing political context within the regime, changes that undermined the regime's strength and drove it into the arms of the ICF. Second, I analyze some of the legal and political thought of Numayri and Turabi in order to better appreciate how they could have come to the conclusion that the adoption of Islamic law was necessary to render the judiciary more efficient and effective.

The Decline of Regime Strength and the Rise of the Islamist Movement

From 1969 to 1976, the Numayri regime seemed to be moving from strength to strength. In 1970 and 1971 it had defeated a communist coup, crushed its political opposition, and established the SSU. An historic peace agreement was reached with the south in 1972, followed a year later by the signing of the Permanent Constitution. Meanwhile, a steady stream of foreign investment from Gulf countries buoyed the Sudanese economy, helping to develop the agricultural sector and raise the standard of living in cities and countryside alike.

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[7] Sidahmed, A. S. (1997). *Politics and Islam in Contemporary Sudan*. Surrey: Curzon, 134-135. For both Sidahmed and Khalid, "political motives" should be understood as referring to material interests, chiefly maximizing the regime's power and entrenching its policy preferences.

In retrospect, it is shocking how quickly it all fell apart. Beginning in 1976 and continuing thereafter until its overthrow in 1985, almost all of the regime's achievements were undone. Government corruption, which had always been a problem in Sudan, reached endemic proportions in the mid-1970s.[8] Amidst the influx of easy capital and generous foreign loans, the regime wasted enormous sums on prestige projects that contributed little to Sudan's economic growth. Poor economic decisions, as well as the declining effects of the oil boom, also began to undermine some of Sudan's leading macroeconomic indicators. Per capita GDP fell at a rate of 2.3% per year, while annual government budget deficits rose from 4% of GDP in 1975 to 13% in 1985, a growth driven largely by lower tax revenue and increased spending on public corporations and other parastatals. By 1984, the last full year of Numayri's rule, total debt as a percentage of GNP stood at 94.6%, having grown from just 23.5% in 1976.[9] During the same time period, inflation grew at an equally astonishing rate, ultimately reaching an annual average of 33% between 1980 and 1985. As a result, the cost of housing, fuel, and basic foodstuffs quickly spiraled out of control, often doubling or even tripling in price. The official cost of living index from the Department of Statistics shows an annual increase of about 20% between 1970 and 1977, but the actual rate of increase was probably much higher.[10] Nor were these costs evenly distributed across class or economic sector. The rural poor were especially hard hit by the rising cost of living, since price controls set by the government prevented farmers from selling wheat and *dura*, two key crops, at fair market rates. This policy directly benefited city-dwellers, though even then it was only a small fraction of urbanites to actually prosper.[11]

On the political front, Numayri's decision to devolve authority to the provinces under the 1973 constitution had seemed to herald a new period of regional equality, but in fact only encouraged the regime to ignore those living outside of the Nilotic core.

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[8] Kameir, E.W. and I. Kursany. (1985). *Corruption as a 'Fifth' Factor of Production in Sudan*. Uppsala: Scandinavian Institute of African Studies.
[9] Farzin, Y.H. (1988). *The Relationship of External Debt and Growth: Sudan's Experience, 1975-1984*. Washington D.C.: World Bank, 6.
[10] "The Battle Against Prices," *Sudanow,* September 1977, p. 6.
[11] Ahmed, A. G. M. (1984). "Social Classes in the Sudan: The Role of the Proletariat." In *Perspectives on Development in the Sudan: Selected Papers*. v. d. Wel and A. G. M. Ahmed. The Hague: Institute of Social Studies, 1-42.

Beginning in the mid-1970s, economic refugees from the countryside began to pour into the capital, where they were met with enormous hostility from the regime.[12] Part of the problem no doubt was that these refugees were largely from Kordofan and Darfur, two areas in which the Ansar were particularly popular. Ultimately, it was from these provinces that the political opposition would launch two coups, the first in 1975 and the second, much more serious one, a year later in 1976. Neither coup was successful, but they shocked the country and greatly undermined Numayri's confidence. Around the same time, many early supporters of the May Revolution began to break with the regime, leaving Numayri increasingly isolated and dependent on a small clique of ministers.

In order to divide the opposition and placate his critics, Numayri launched a program of "National Reconciliation", in which he reached out to the three leading opposition forces in Sudanese politics. The first was the Ansar, led by Sadiq al-Mahdi from his base in Libya, to which he had fled after the 1971 attack on Aba Island. Though initially receptive to the regime's overtures, al-Mahdi eventually backed out of the National Reconciliation process after Numayri failed to follow through on his promises to reform the SSU.[13] The second opposition group was the Khatmiyya, but its leader Sharif al-Hindi was much more skeptical than al-Mahdi had been, and negotiations with this group never advanced very far. In the end, the only political force that agreed to join the government was the ICF, still led by the charismatic Hassan al-Turabi. In return for his support, Turabi was appointed attorney general, a position from which he was able to pursue his plan to bring the nation's laws and judicial structure into conformity with *shari'a*.

The ICF's interest in *shari'a* was longstanding, and was part of a larger movement in Sudan committed to returning the country to what it felt to be its Islamic heritage. One early advocate was Hassan Muddathir, who served as Grand Qāḍī during the transition to independence. In 1956, he published an influential pamphlet calling for

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[12] El-Shazali Ibrahim, S. E.-D. (1984). "Theory and Ideology in Sudanese Urban Studies: Towards a Political Economy of Peripheral Capitalist Urbanism." In *Perspectives on Development in the Sudan: Selected Papers*. P. van der Wel and A. G. M. Ahmed. The Hague: Institute of Social Studies, 43-86.

[13] Hamid, M. B. (1984). *The Politics of National Reconciliation in the Sudan: The Numayri Regime and the National Front Opposition*. Washington D.C.: Centre for Contemporary Arab Studies, Georgetown University.

a national constitution based on Islamic principles. A country's legal system, he argued, ought to reflect people's "inherited beliefs, inborn customs and…what has been considered as good or bad by practice and modified by religion."[14] In Sudan, he argued, this meant above all else a constitution grounded in *shari'a*. By adopting *shari'a* and integrating it into the nation's political institutions, all manner of social goods would be won, including democracy, women's equality, personal liberty, and workers' rights. While Muddathir's proposal ultimately failed to win the day, his argument that only an Islamic constitution could properly reflect and protect people's everyday beliefs and habits was persuasive for many. According to Turabi, the issue of an Islamic constitution was a galvanizing one for the early ICF, prompting it to develop many of the tactics for mobilization and political lobbying that would later make it such an effective force.[15]

For the ICF, the decision to abandon the opposition and join Numayri in government was a difficult one. Many within the movement criticized Turabi for joining a regime that had so recently been their persecutor. There was also a great deal of skepticism about Numayri's sincerity on the issue of Islamic reform, since he had begun his reign as an ardent socialist and secular nationalist. Nevertheless, the group was anxious to end the crippling cycles of repression and isolation, and the decision to accept the offer of National Reconciliation received widespread endorsement.[16] The ICF's support among students, as well as its traction within the business community and expanding access to Gulf financing, made it an attractive ally for Numayri, and as a result the group was soon given real power within the regime.[17] In addition to Turabi's

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[14] Muddathir, H. (1956). *A Memorandum for the Enactment of a Sudan Constitution Devised from the Principles of Islam*. Khartoum: McCorquodale Ltd, 1.
[15] Turabi, H. (2008). *The Islamic Movement in Sudan: Its Development, Approach, and Achievements*. Beirut: Arab Scientific Publishers, 33.
[16] El-Affendi, A. (1991). *Turabi's Revolution: Islam and Power in Sudan*. London: Grey Seal, 113-116.
[17] The ICF sat astride a growing stream of workers' remittances from Gulf countries, chiefly sent by Sudanese laborers who had crossed the Red Sea during the oil boom. By helping to transfer these remittances and channel them into the black market, the ICF had access to enormous financial resources at a time of foreign currency scarcity. Numayri's decision to court the ICF was motivated in part by his interest in this underground financial market, as well as by his hope that increased association with Islamists might win him greater support in Saudi Arabia. See Medani, K. M. (2003). "Globalization, Informal Markets and Collective Action: The

appointment as attorney general, other members of the ICF were given positions within the SSU, the civil service, and the judiciary. From these vantage points, the organization was able to gradually establish tangible political power, leaving it in a strong position to design and advocate for the reimplementation of Islamic law.

Shari'a, Human Nature, and Judicial Efficiency

The second reason that the regime chose to adopt the sweeping reforms of the late 1980s was to increase judicial efficiency. As was already described in Chapter Four, by the mid-1970s the judiciary's case backlog had become a major problem in Sudan. The belief, at least among many within the regime and including Numayri and Turabi, was that by authorizing Sudan's judges to creatively apply Islamic law, they could quickly cut through the "procedural prattle" that characterized the nation's legal system and arrive at speedy resolutions to difficult cases.[18] Under the new reforms, therefore, judges were encouraged to place a premium on "rationalization, simplification, and abbreviation," to act decisively in all things, and prioritize above all the cause of "prompt justice" (*al-'adāla al-nājiza*).[19]

How would bringing the country's legal system into conformity with *shari'a* make it more efficient? The essential notion, common among many advocates for Islamic law in Sudan,[20] is that law is most efficient and most beneficial when it tracks people's basic moral intuitions. By bringing public law into greater conformity with a person's innate knowledge of right and wrong, it becomes much easier for that person to follow the law and for the state to implement it.[21] In Sudan, this was understood above all to entail a decisive break with the common law tradition, which was dismissed by

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Development of Islamic Ethnic Politics in Egypt, Sudan and Somalia," (PhD diss., University of California, Berkeley), 166-167.

[18] Abdulsalam, E.-M. (2010). *Al-Haraka al-Islāmiyya al-Sūdāniyya: Dā'ira al-Ḍū', Khūyūt al-Ẓalām*. Cairo: Dar Madarik, 47.

[19] "The Judiciary Mobilizes Its Agencies for Reform and Comprehensive Rationalization" *Al-Ṣahāfa* May 3, 1984, p. 1.

[20] See for instance the argument of Hasan Muddathir discussed above.

[21] This argument is not unique to Sudanese Islamists, nor even to Muslims in general. It is an important stream within natural law theory, and has often been used to advocate constructing law around prevailing notions of morality. See Goodin, R. (2010). "An Epistemic Case for Legal Moralism." *Oxford Journal of Legal Studies* 30(4): 615-633.

many as a colonial import. Through bringing the civil judiciary into conformity with *shari'a* instead, it was argued, people's everyday behavior and intuitions would be brought into such close proximity with the dictates of the law that the two would effectively become one.

The link between people's everyday moral intuitions and the content of *shari'a* is actually an important strand in modern Islamic thought, one that both Turabi and Numayri himself cited to justify the "judicial revolution". In *Al-Nahj al-Islāmī, li-Mādhā?*, Numayri claims that Islam is perfectly suited for mankind. It fulfills all of his needs and asks nothing of him that is beyond his ability to deliver. This is why Islam spread so quickly throughout the ancient world, according to Numayri. It "did not lag behind people's aspirations" nor "exceed what they had been hoping for….The call to Islam coincided exactly with the social and economic conditions of an age."[22] While he acknowledges that some have accused him of trying to "bring back the old", he proudly accepts the charge. "Is [the implementation of *shari'a*] the return of the old? Yes – but the old is eternal, the old is everlasting, the old is absolute, going back to [the time of Adam]…Is it the return of the old? Yes, but it is the old that truly encompasses human nature (*fiṭra*)."[23]

Turabi uses a similar argument to justify both the adoption of *shari'a* and the expansion of judicial discretion. The dual punches of "Greek logic" and colonialism have profoundly distorted the meaning of *shari'a*, he claims. Rather than attend to the needs and problems of everyday people, Muslim judges have become fixated on "sterile categories of theory" that generate nothing but "endless debate" and have little to offer the modern Muslim.[24]

Turabi's solution to this problem was a total intellectual and methodological renewal (*tajdīd*) of Islamic jurisprudence, starting with the rapid expansion of judicial discretion. The traditional techniques used by the judge to interpret and adapt the *shari'a* to individual circumstances (e.g. analogies, personal judgment, the consideration of public interest) are too narrowly conceived and timidly applied. What is needed is a

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[22] Numayri 1980, 71.
[23] Numayri 1984, 183.
[24] Turabi, H. (1980). *Tajdīd Uṣūl al-Fiqh al-Islāmī*. Khartoum: Dar al-Fikr, 5.

more expansive (*wāsi'*) version of these techniques, decisively wielded and driven at all times by a keen understanding of the needs of public life. A special emphasis is placed on *qiyās* (analogies) and *istiṣḥāb* (the principle of legal continuity), which Turabi believes can open up the *shari'a* to the modern world.[25] Using this methodology, the judge can cut through the accretion of centuries of legal theory and get straight to the heart of matter: What is God's will?

Of course, as some scholars have noted, Turabi is unusually vague about what limits, if any, are to be placed on these methods.[26] There is a very real danger, after all, that an emphasis on the public interest might lead a jurist to conclusions at odds with the plain meaning of revealed law or the interests of the regime. Fortunately, according to Turabi, judges will be guided in all things by their own innate moral instincts and intuitions. Once the principles of *shari'a* are accepted by the judge, his own human nature (*fiṭra*) and emotional sentiment (*wijdān*) will guide him toward the correct path.[27] His moral intuitions will act as a sort of check on judicial excess, compelling him to remain within the boundaries of acceptable jurisprudence.[28] The principle reason that the regime can entrust the judiciary with the power and discretion necessary to implement Islamic law, therefore, is not because of some new institutional configuration or coercive threat, but rather the inescapable force of human nature.

Though brief, this analysis of the *ideational* factors influencing regime decision-making already helps us to make sense of why judicial reform in the early 1980s took the shape that it did. Specifically, these reforms vastly increased the power and personal

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[25] Ibid 24-28.
[26] Hallaq, W. B. (1997). *Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh*. Cambridge: Cambridge University Press, 229-230.
[27] Numayri and Turabi are both drawing here on a powerful tradition within modern Islamic legal thought that asserts the fundamental harmony between the requirements of *shari'a* and the basic nature of humanity. See Griffel, F. (2007). "The Harmony of Natural Law and Shari'a." In *Shari'a: Islamic Law in the Contemporary Context*. A. Amanat and F. Griffel. Stanford: Stanford University Press; March, A. (2009). "The Uses of Fitrah (Human Nature) in the Legal and Political Theory of 'Allal al-Fasi: Natural Law or 'Taking People as They Are'?" Yale Law School, Public Law and Legal Theory Research Paper Series; and (2010). "Taking People as They Are: Islam as a 'Realistic Utopia' in the Political Theory of Sayyid Qutb." *American Political Science Review* 107(1): 189-207.
[28] Turabi, H. (2010). *Fī al-Fiqh al-Siyāsī: Muqārabāt fī Ta'ṣīl al-Fikr al-Siyāsī al-Islāmī*. Beirut: Dar al-Arabiyya lil-Alum Nasharun, 20-24.

discretion of Sudan's judges, despite the underlying mutual mistrust between judiciary and regime. As we have seen, judicial power and flexibility were both thought to be necessary for the reforms to succeed. Without them, the law could never be brought into conformity with the basic needs and moral intuitions of the people. With this in mind, it is to those reforms, which unfolded in three distinct waves, that we now turn.

II. The First Wave of Judicial Reform: Judicial Unification

The first wave of judicial reform began in 1980, when Sudan's civil and *shari'a* judiciaries were finally unified, ending a division dating back to the earliest days of the Anglo-Egyptian Condominium. The office of the Grand Qāḍī was abolished and its last occupant, Sheikh Muhammad al-Jizuli, forced to resign. Though the position of Mufti was not eliminated, it was reassigned to the Attorney General's staff and thus ceased to be a purely judicial office. The Shari'a Court of Appeals, meanwhile, was abolished and its duties transferred to a single High Court of Appeals dominated by civil-trained judges.[29] Individual judges were forced to take three month-long rolling sabbaticals, during which they received training in their counterparts' legal tradition. Divided into groups and dispatched for retraining fifty at a time, they were given three years to complete the process of re-education.[30] Lawyers soon followed suit, since it was no longer sensible for a law practice to specialize in one legal tradition to the exclusion of the other. Budgets were also combined, promotion schedules synchronized, and physical infrastructure held in common.

Plans to unify the judiciary date back to the earliest days of the Numayri regime. In fact, the two divisions had been merged before, during the county's brief flirtation with civil law (1971-1973), but did not outlast that project's collapse. The idea was never wholly abandoned, however, and law review committees continued to draw up plans and recommendations throughout the 1970s.[31] When formal reforms were announced in 1979, therefore, few civil judges or *qāḍīs* were entirely surprised. Instead, the only

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[29] Fluehr-Lobban, C. (1987). *Islamic Law and Society in the Sudan*. London: Frank Cass and Company Limited, 278-282.
[30] "Too Many Chiefs and Not Enough Judges," *Sudanow* September 1980, p. 13.
[31] Khalid, M. (1986). *Al-Fajr al-Kādhib: Numayrī wa Taḥrīf al-Sharī'a*. Cairo: Dar al-Hilal, 295-296.

questions were about how thorough the unification would be and whether it would be accompanied by the adoption of a unified legal code. Though a committee had been formed in 1977 to bring the country's laws into conformity with *shari'a*, only one of its proposals was adopted by the government – a *zakāt* bill designed to regulate the collection of the religious tax.[32] At the time of judicial unification in 1980, therefore, little in the way of substantive legislative reform had been completed. Matters of family law (e.g. marriage, divorce, custody, inheritance, etc.) continued to be decided according to *shari'a*, while criminal and many civil concerns were decided through civil legislation. While the judiciaries were *administratively* unified, therefore, the distinction between religious and secular law remained, requiring judges to move back and forth between legal traditions on a case-by-case basis.

What are we to make of this first round of reform? Its most direct consequence was to immediately increase the number of judges authorized to hear a given case, even while the overall number of judges in Sudan remained constant. Civil judges were now permitted to hear *shari'a* cases, and vice versa. Much of the scholarly literature on the judiciary's unification tends to understand Numayri's decision either as a result of pressure from the Sudanese Muslim Brotherhood or as part of a much larger historical process of institutional decolonization and cultural reclamation.[33] However, in light of the trends described in Chapter Four, as well as the ideological analysis discussed in Section One above, there can be little doubt that the regime was also motivated by a desire to ease some of the personnel problems plaguing the judiciary, including its persistent inefficiency and inability to decide cases in an expeditious manner. This is not to suggest that these concerns trumped the influence of political expediency, a conclusion that the evidence presented here would not warrant. The breakdown of judicial efficiency

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[32] The committee, which was led by Turabi and charged with bringing Sudan's laws into conformity with the *shari'a*, also recommended revisions to sections of the Penal Code dealing with alcohol, gambling, and usury (*ribā*). However, it ultimately determined that relatively few laws required significant alteration; of the two hundred and eighty-six laws it examined, only thirty-eight were found to be in actual conflict with the *shari'a*. Ali, H. I. (1991). *Azmat al-Islām al-Sīyasī: al-Jabha al-Islāmiyya al-Qawmiyya fī l-Sūdān: Namūdhajan*. Casablanca: Dar Qurtuba li'l-Tiba'a wa'l-Nashr, 82.

[33] Ibrahim, A. A. (2008). *Manichaean Delirium: Decolonizing the Judiciary and Islamic Renewal in the Sudan, 1898-1985*. Leiden: Brill.

was one cause among many for the first wave of judicial reform. As we shall see, however, concerns over the ability of judges to swiftly and efficiently deliver justice would exercise a profound influence on the *nature* of the regime's reforms, suggesting that Numayri, Turabi, and many other political leaders took them very seriously.

The long-term impact of this reform, however, is more difficult to assess. Certainly its significance is hard to dispute, since it brought to a decisive end the "split" between secular and religious judicial branches that dated back to the earliest days of the Condominium.[34] This was an issue on which the state had adopted a range of positions over the years, sometimes favoring one branch of the judiciary over the other and sometimes enforcing a rigid separation.[35] The 1980 reform marks a sharp end to this indecision, initiating a period of relative stability in judicial structure.

But it also marks a profound transformation in what we might call, following Hussein Agrama, the "problem space" of secularism in Sudan.[36] The pre-1980 relationship between the *shari'a* and civil branches of the judiciary was a deeply ambiguous one, with more mixing, overlap, and competition than colonial and post-colonial administrators were willing to admit. As in many other African and Middle

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[34] This split, which was briefly discussed in Chapter Two, has its origins in the Mohammedan Law Courts Ordinance of 1902, which defines the jurisdiction of the *shari'a* branch of the judiciary as being over matters of "marriage, divorce, guardianship of minors or family relationship," as well as over "waqf, gift, succession, wills, interdiction or guardianship of a lost or interdicted person," and any other civil matter the disputants expressly agree to have settled according to Islamic law (*The Laws of the Sudan*, Vol. II, Title 28). Like the civil judges, the *shari'a* judges were part of the Legal Department and subservient to the Legal Secretary in administrative (though not juridical) matters. Unlike civil judges, however, they did not answer to the Chief Justice or province judges. Rather, they were overseen by the Grand Qāḍī, who was authorized by the Governor General and Legal Secretary to regulate the *shari'a* courts, oversee personnel, and occasionally publish "judicial circulars" designed to explicate aspects of Islamic law, of which sixty-two were published prior to 1980 (Memorandum on Mohammedan Law Courts 1907, Circular Memorandum 44, SAD 542/21/32).

[35] In 1967, one of Sudan's short-lived civilian governments passed the *Shari'a* Courts Act, which asserted the administrative independence of the Grand Qāḍī from the Chief Justice. This shift was reversed two years later, however, by the Judiciary Authority Act, 1969, after which the judiciary briefly reverted to the status quo. The two judiciaries were merged into a single secular legal system during Numayri's short flirtation with civil law in 1972, but this too was overturned the following year when his legal experiment collapsed. Thus, while the 1980 reforms were not the state's first attempt to unify the judiciary, they have proved to be both the most sweeping and the most durable.

[36] Agrama, H. A. (2012). *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt*. Chicago: University of Chicago Press, 27.

Eastern colonies, the distinction between the secular and the religious was deeply contested, not just by the colonial state (which was happy to mix jurisdictions when it suited its interests) but by a variety of social actors eager to have their dispute heard in the most favorable venue.[37] Litigants often displayed a skill in negotiating the legal terrain that surprised judicial administrators, revealing a much more sophisticated understanding of how permeable categories like "public" and "private" could actually be.

For instance, one common way of smuggling *shari'a* principles into Sudanese common law courts was through appeals to custom (*'urf*), which historically had been an important part of *shari'a*, but under the British was considered a distinct and autonomous body of law.[38] Another was through the application of the principle of "justice, equity and good conscience", which common law judges could use wherever the law was silent or yielded an unjust result. In the decade following independence, judges often cited this principle as a way of bringing Islamic law (which was claimed to be closely aligned with justice and equity) into an ostensibly secular courtroom.[39] There was an element of fiction, therefore, to the distinction between the two judicial branches. Nevertheless, the *idea* of a sharp division remained an important element of colonial and post-colonial ideology in Sudan, as it helped to justify the state's claim to juridical sovereignty over matters of public law, while at the same time professing its respect for *shari'a*.

The 1980 unification of the judiciaries, therefore, transformed the way that the "secular" and the "religious" were conceptualized as categories of law. This ambiguous process of legal mixing and adaptation was brought to an abrupt end, not through their rigid separation but through their formal unification. Two further consequences suggest

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[37] On this practice in other colonies and post-colonies, see Benton, L. (2002). *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*. Cambridge: Cambridge University Press.
[38] On the impact of custom on *shari'a* and the debates surrounding its legitimacy, see Gerber, H. (1999). "'*Urf* (Custom) - The Practical Secularization of Islamic Law." In *Islamic Law and Society, 1600-1840*. H. Gerber. Leiden: Brill. Furthermore, as was noted in Chapter Two, *shari'a* provisions were routinely applied to criminal cases by native courts, for example through the payment of *dīya* (blood price) by murder suspects.
[39] See for example *Nicolas Stephanou Stergiou v. Aristea Nicolas Stergiou* (1963). Other cases in which *shari'a* was cited by civil courts to clarify or resolve a legal problem include *Heirs of Naeema Ahmed Wagealla v. El Hag Ahmed Mohammed* (1961), *El Hag Ali Hamri v. Sid Ahmed Mohammed* (1962), and *Tamman Huds v. Ahmed Mohammed Abdalla* (1962). For a description of this process, see Mustafa, Z. (1971). *The Common Law in the Sudan: An Account of the 'Justice, Equity, and Good Conscience' Provision*. Oxford: Clarendon Press, 214-215.

themselves. On the one hand, by exposing judges and *qāḍīs* to a common set of texts and judicial practices, all located within a shared collection of institutions and offices, certain ways of thinking about the law that were specific to one judiciary began to migrate over to the other. On the other hand, the unification of the judiciary also greatly increased each judge's jurisdictional purview, permitting *qāḍīs* to hear cases of criminal or constitutional law, for instance, that had been closed to them before.

III. The Second Wave of Judicial Reform: The September Laws

The second wave of judicial reform began in September of 1983, and was far more sweeping in scope. This is because the administrative reform of 1980, while an important shift in judicial structure and administration, left the fundamental *legislative* distinction between the religious and the secular intact. As such, Islamic law remained confined (at least officially) to matters of private law, even if *qāḍīs* themselves were now authorized to rule on criminal and constitutional matters. Without a unified legal code, one that drew upon a common set of texts and hermeneutical techniques for cases both public and private, secular and religious, judicial unification would remain incomplete.

This, then, was the content of *al-thawra al-qaḍā'īyya* – the "judicial revolution" – that Numayri launched in August of 1983.[40] Over the course of the next few months, he announced the promulgation of a whole raft of new legislation, all explicitly derived from Islamic law and jurisprudence. These include the Civil Procedure Act, the Criminal Procedure Act, the Evidence Act, the Propagation of Virtue and the Prevention of Vice Act, and the Judgments (Basic Rules) Act. Further legislation, including the *Zakāt* Tax Act and the Civil Transactions Act, followed in 1984. Collectively, they are known as the September Laws, after the month in 1983 when their promulgation began.

The Expansion of Judicial Discretion

These laws were introduced at an exceptionally sour moment in regime-judiciary relations. Over the course of the previous summer, the judiciary had engaged in a countrywide strike over executive interference, poor working conditions, and stagnant

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[40] "Comprehensive Judicial Revolution," *Al-Ṣahāfa*, August 12, 1983, p. 1.

wages. In response, Numayri ordered the firing and detention of hundreds of judges and lawyers, including several sitting members of the High Court.[41] Criticizing the judiciary for striking during a time of national crisis, Numayri sought to frame his conflict with the judiciary as essentially a clash over the meaning of justice – his own vision of swift, moral retribution versus the "deformed and distorted justice" of the judges, who would rather traffic in stale procedure and legal technicalities than the lived reality of the law.[42] Ultimately, Numayri won through surrender. That is to say, he suddenly and without warning offered to raise the judges' salaries, grant them new benefits, and reinstate some of those sacked during the strike. In the eyes of many Sudanese, this abrupt act of generosity transformed the judges' cause from a legitimate concern with executive interference into a selfish desire for more money. Unable to mount a coherent counter-case or sustain its street protests, the strike quickly fizzled.

In light of this context, the passage of the September Laws just a few weeks later is all the more remarkable. This is because while the laws had a variety of effects, the one thread that runs continuously through the various codes and acts was a principle of wide judicial discretion. This aspect of the September Laws is frequently mentioned in the scholarly literature, but has rarely been the subject of sustained attention.[43] This is surprising, since collectively, the laws transferred an enormous degree of discretionary authority to judges, whether in the weighing of evidence, the use of precedent, or the handing down of sentences. Examples of this phenomenon are scattered throughout the laws, and generally existed to ease the complex process of incorporating an uncodified *shari'a* into Sudan's legal system. However, they had the side effect of vastly increasing the power of the judiciary and its independence from the other branches of government.

Nowhere is this more clearly illustrated than in the 1983 Penal Code, which, in an accompanying explanatory note, explicitly emphasizes the importance of wide judicial

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[41] "JANA Notes Deteriorating Situation in Sudan." FBIS-MEA-83-157 (Foreign Broadcast Information Service), August 11, 1983.
[42] "During the Press Conference, the President Announced Decisions about the Judiciary," *Al-Ṣahāfa* August 12th, 1983, p. 3.
[43] Of the major works in English that discuss the role of judicial discretion in the September Laws, the only one to treat the subject in any length is Layish, A. and G. R. Warburg (2002). *The Reinstatement of Islamic Law in Sudan under Numayri*. Leiden: Brill, 92-94, 101-133.

discretion in the cause of justice.[44] For instance, Section 458(3) of the Penal Code permits a judge to impose a discretionary punishment on a defendant if the presence of doubt (*shubha*) makes it impossible to convict him or her of a *hadd* offense. These are the offenses for which the Qur'an lists specific punishments, and include such crimes as adultery, fornication, theft, and the consumption of alcohol. Because they often carry such harsh punishments, however, prosecutors have traditionally been required to prove guilt with a high degree of certainty.[45] Section 458(3) surmounts this obstacle by allowing the judge to impose some other (non-*hadd*) punishment if conviction of a *hadd* offense is impossible. Essentially, this provision of the Penal Code authorizes judges to reach beyond the text of the code or the facts of the case itself, and to invent punishments entirely without foundation in statutory legislation.

To imagine how this provision might work in practice, we can consider the case of a defendant arrested because of the presence of wine stains on his clothing. Section 79 of the Evidence Act of 1983 lists the *smell* of wine as sufficient proof of alcoholic consumption, but makes no mention of stains. A clever defense attorney, therefore, might reasonably suggest that some *other* person had spilled wine on the accused, introducing an element of doubt to the charge that consumption actually took place. In such a circumstance, the judge could not impose the *hadd* punishment on the defendant, but he *could* use Section 458(3) of the Penal Code to impose some other punishment that he felt to be appropriate. Thus, even though the defendant's guilt in the matter of alcohol consumption was never proven, and even though the law omits any mention of wine stains as a sufficient indicator, the judge can use his personal discretion to sentence the man to prison or to pay a fine. This is a remarkable juridical innovation on the part of the regime, one that endowed the judiciary with far greater latitude than anything it had previously possessed.

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[44] For a fascinating, if slightly polemical, analysis of the Explanatory Note, see Khalid 1986, 50-54. Khalid divides the note into four sections, covering matters of legal culpability, the *hudūd* offenses, equality before the law, and the superiority of flogging over imprisonment as a form of punishment. Khalid criticizes the note at each step, declaring it to be "full of fallacies, lies, and unjust claims" that betray its author's total ignorance of Islam. Khalid 1986, 51.

[45] Rabb, I. (2010). "Islamic Legal Maxims as Substantive Canons of Construction: *Hudūd*-Avoidance in Cases of Doubt." *Islamic Law and Society* 17: 63-125.

Another example of judicial discretion can be found in the application of the "eclectic expedient" (*takhayyur*). The eclectic expedient is a widely accepted principle of Islamic *fiqh* that allows a *qāḍī* to select from amongst a variety of judicial doctrines and legal schools when deciding on a case. Sunni Islam admits of four main *madhabs*, or schools, of legal thought: Hanafi, Maliki, Shafi, and Hanbali. Each one offers a different way of defining various legal concepts or purposes, and thus each contains a different approach toward crime and punishment. Historically, the dominant *madhab* in Sudan had been the Maliki, but this was displaced by the Hanafi following the Turco-Egyptian conquest of 1821. The eclectic expedient allowed Sudanese judges and legislators to shift between different *madhabs* as they saw fit, following for instance the Maliki evidentiary standard for crimes involving "illicit intercourse", but the Shafi school when punishing the consumption of alcohol.[46]

Depending on the legal issues involved, legislators could specify in statute the doctrinal interpretation judges were to follow. However, both the Criminal and the Civil Procedure Acts of 1983 give the Chief Justice and the High Court wide latitude to issue legal circulars mandating one *madhab* over another, regardless of what legislators might have intended.[47] Al-Mukashihfi Taha al-Kabbashi, himself a member of the High Court and president of the Criminal Court of Appeals in Omdurman during the early 1980s, made frequent use of this power. It was, he argued, an authority made necessary "because the doctrine of a given moment in time cannot meet the needs of [all] time and the changing public interest (*maṣlaha*)…especially in a country like Sudan, where there are so many tribes with different customs and traditions."[48]

Other pieces of legislation are more explicit in transferring power from the executive branch to the judiciary. Section 215(2) of the Criminal Procedure Act of 1983 prevents the Attorney General from terminating a criminal proceeding if a judge determines that doing so violates the *shari'a*.[49] A similar prohibition (Section 257)

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[46] See Layish and Warburg 2002, 118 and 121, respectively.
[47] Ibid 117.
[48] Al-Kabbashi, A.-M.T. (1986). Al-Kabbashi, A.-M. T. (1986). *Taṭbīq al-Sharī'a al-Islāliyya fī al-Sūdān bayna al-Haqīqa wa al-Ithāra*. Cairo, Al-Zahra li'l-I'lam al-Arabi, 14.
[49] An example of the court successfully exercising this authority over the Attorney General's office can be found in Al-Kabbashi 1986, 42.

prevents the President from commuting a sentence or pardoning a criminal in contravention of Islamic law. In this law and many others, there is a pronounced shift in discretionary authority away from the executive and legislative branches and toward the judiciary, which had positioned itself as the sole branch of government with the requisite knowledge and skill to bring the Sudanese legal system into conformity with Islamic law.

The Judgments (Basic Rules) Act

Perhaps the single most important piece of legislation, however, and the one that had the most dramatic impact on the scope of judicial discretion under Numayri, was the Judgments (Basic Rules) Act (*qānun uṣūl al-ahkām al-qaḍā'īyya*) of 1983. The Judgments Act describes how a judge ought to respond when confronted with an ambiguous statute or a legislative lacuna. According to Section 3 of the act, his first responsibility is to apply the *shari'a* as presented in the Qur'an and the *sunnah*. But if, as was very often the case, no relevant *shari'a* principle or ruling can be found, he is instructed to follow his own personal discretion. In doing so, he should take account of such factors as the prevailing scholarly consensus, the need to serve the public good, established judicial precedents, and finally the importance of "natural justice" (*'adāla fitriyya*) and "good conscience" (*wijdān salīm*).[50]

In many ways, the Judgments Act of 1983 was the most ambitious and transformative of all the laws Numayri promulgated during his judicial revolution, since it opened up a whole universe of legal possibilities that had, up till then, been foreclosed to the Sudanese judiciary. And again, it did this through the figure of the judge, endowing him with enormous powers of discretion and creative interpretation, up to and including the power to overrule other branches of government. This can best be understood by seeing the role of the Judgments Act, specifically Section 3, in the conviction of two defendants: Lalitt Ratnalal Shah and Mahmoud Muhammad Taha.

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[50] In addition to echoing the phrases of the "justice, equity and good conscience" principle mentioned in Section Two, this focus on human nature within the Judgments (Basic Rules) Act shows the influence of Turabi, who as was discussed in Section One placed a great deal of faith in the power of human nature (*fiṭra*) to guide judicial conduct and shape the law.

Shah, an Indian textile merchant with various business interests in Sudan at the time, was arrested in July of 1984 and convicted of usury (*ribā*). Taha, leader of the Republican Brothers movement and a prominent critic of the September Laws, was convicted and executed in January of 1985 for apostasy (*ridda*).[51] What makes these cases remarkable is the fact that neither usury nor apostasy were crimes under the Sudanese Penal Code – statutorily, both "crimes" were in fact perfectly legal.[52] In each instance, therefore, the court used Section 3 of the Judgments Act to convict the accused based on the provisions of the uncodified *shari'a*. The arrest and conviction of Taha, which was prompted by the circulation of a Republican Brothers' pamphlet denouncing the regime for distorting Islam, has garnered significant attention for this reason, and has come to be regarded in Sudan as something of a judicial scandal.[53] Not only was Taha never charged with apostasy by the public prosecutor, he was never actually *convicted* of apostasy by the trial court that initially heard his case. It was not until he was brought before the Criminal Court of Appeals that he was found guilty of apostasy – and even then, the judge made no attempt to link this conviction to actual evidence introduced

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[51] The literature on Taha and his movement is sizable. The best introduction to his thought is his own *magnum opus*, (1987). *The Second Message of Islam*. Trans. An-Na'im. Syracuse: Syracuse University Press. For a critical analysis of this and other writings by Taha, see Mahmoud, M. A. (2007). *Quest for Divinity: A Critical Examination of the Thought of Mahmud Muhammad Taha*. Syracuse: Syracuse University Press. In the immediate aftermath of his execution, a number of works were published that analyze the political impact of Taha's movement and his conflict with Numayri. Among these are Ahmad, R. S. (1985). *Limādha Ā'damanī Numayrī?: Qira'ā fī Awrāq al-Shaikh Mahmūd Tāhā*. Cairo: Dar Alif lil-Nashr; Ibrahim 2008, 273-322; and An-Na'im, A. A. (1986). "The Islamic Law of Apostasy and Its Modern Applicability." *Religion* 16: 197-223 and (1988). "Mahmud Muhammad Taha and the Crisis in Islamic Law Reform: Implications for Interreligious Relations." *Journal of Ecumenical Studies* 25(1): 1-21.

[52] Section 281 of the Civil Transactions Act, 1984, does declare invalid any part of a contract that awards one party "excessive profit," a term it derives from the *fiqh* on usury. The court's directive to the Bank of Sudan (discussed below) cites this passage as proof of usury's criminality, but it is highly unusual for a judge to transfer an oblique reference to usury in a civil code to the context of a criminal trial.

[53] Following Numayri's overthrow, Taha's daughter Asma petitioned the High Court to overturn her father's conviction and posthumously exonerate him. The newly elected government of Sadiq al-Mahdi endorsed Asma's petition, and during the resulting trial, *Mahmoud Muhammad Taha & Others v. The Government of Sudan* (1986), the judges found that his conviction was in clear violation of the Constitution and of the September Laws themselves. In 1989, the government accused the judge who convicted Taha of apostasy of operating with "criminal bad faith", but the High Court ruled that his status as a former judge rendered him immune to prosecution. See *Government of Sudan v. Al-Makashfi Taha al-Kabbashi* (1989).

during trial. Through the discretionary authority imparted to the court through Section 3, the judge was able to reach beyond the letter of the law and the context of the trial, and access instead the great body of uncodified, informal *shari'a*, alone for which apostasy was deemed a crime.

In the case of Shah, the court went one step further. Having used Section 3 to convict Shah of usury, it then issued a directive to the Bank of Sudan ordering it to cease all transactions involving interest payments. This directive made no attempt to ground its legal reasoning in statute or judicial precedent, explaining instead that the court's fundamental duty was "to cleanse Sudanese society of all manifestations of ignorance (*jāhilīyya*) and the remnants of colonialism in violation of the law of God Almighty." For that reason, it wrote, "any dealing in *ribā*, authorized or not, will be subject to criminal liability by law (*qānun*) and *shari'a*."[54] Considering the magnitude of the shift that the court was requiring the bank to make, this order represents a remarkable exercise of judicial power. Presumably if Numayri had intended to ban usury in Sudan, he would have included it in the Penal Code. Instead, usury was outlawed because of a judicial decree, itself brought about through the personal discretion and independent reasoning of single judge.

IV. The Third Wave of Judicial Reform: Prompt Justice

To summarize this chapter's argument thus far, we can see how the regime's judicial reforms both administratively and legally unified the civil and *shari'a* branches of the judiciary. In the process, it also endowed Sudan's judges with new powers and personal discretion far in excess of what they had possessed previously. Through a variety of means, judges were able to exercise their independent judgment on matters of evidence, precedent, and sentencing, and were even able to implement a version of judicial review so sweeping in scope that it turned judges into virtual legislators. Considering the poor relations at the time between the regime and the judiciary, this transfer of discretionary authority poses something of a puzzle. As an example of judicial reform, it suggests that Numayri had a different way of conceptualizing justice

[54] Directive of the Criminal Court No. 1 (Omdurman) to the Bank of Sudan, 1984. A transcript of this memo can be found in al-Kabbashi 1986, 48-49.

and regime-judiciary relations than what might have been predicted, given his acrimonious relationship with the legal profession. In this section, I explore one of the ways that Numayri sought to bring the judicial system to heel. Beginning in early 1984, a special network of quasi-judicial institutions was established across the country, institutions that possessed many of the same powers as the formal judiciary but lacked its protections from government interference. When this parallel judicial network was incorporated into the judiciary, it brought with it a cohort of judges already habituated to support the regime and favor its particular brand of justice. Through this introduction of new judicial personnel, the judiciary was gradually transformed from an institution generally hostile to Numayri's reforms to something much more fragmented and uneven, where one might easily find a regime loyalist serving on the same bench as one of its most ardent critics. Thus, even as judicial power and discretion were being expanded through the adoption of Islamic law, the judicial profession itself was being transformed into a willing partner of the regime.

Law in a Time of Emergency

On the evening of April 29th, 1984, Numayri announced over the radio an immediate and indefinite state of emergency. All processions, demonstrations, and rallies were banned, and the armed forces were given sweeping new powers to monitor, detain, and interrogate without judicial oversight. Regular police were also given new powers of detention, though not quite so expansive, and public utilities and civic organizations were mobilized in service of the state. Later that evening and with the apparent consent of the President, one high ranking government official announced that he would interpret the declaration of emergency as authorizing him to regulate public markets and enforce price controls. While such steps were not, strictly speaking, related to public security, they were nevertheless necessary "in order to help each person to live a decent life by providing him with essential goods and necessary services."[55] All told, twelve articles of the 1973 Permanent Constitution were suspended, including those guaranteeing freedom

[55] "Mayor Explains the Purpose of the State of Emergency," *Al-Ṣahāfa* April 30, 1984, p. 1.

of movement, privacy, expression, unionization, the right to a fair and transparent trial, and the right to sue the government for constitutional violations.[56]

The proximate cause of this emergency was the Libyan bombing of a radio and television complex in Omdurman the previous month. A nearby school for girls and several homes were also damaged, leaving five civilians dead and fourteen injured.[57] Several weeks passed before Numayri declared a state of emergency, however, and intervening events in the domestic arena likely weighed heavily on his decision. Indeed, Numayri made only passing reference to the Libyan threat during his remarks, alluding to those who sought to oppose the banner of "There Is No God But Allah" with "the red banner of Marxist-Leninism." Instead, the main focus of his speech was on domestic threats, particularly those posed by two groups: economic criminals (eg. smugglers, price gougers, counterfeiters, etc.) and opponents of *shari'a*. However, these two groups were not entirely distinct in Numayri's mind, as he saw the implementation of *shari'a* as the only possible solution to the crime epidemic.

In declaring a state of emergency, Numayri relied on two legislative sources: Article 111 of the 1973 Permanent Constitution, and the colonial-era Defence of the Sudan Ordinance of 1939, which the reader will recall was discussed in Chapter Three. The former permits the President to declare a state of emergency, during which he may suspend "all or any of the rights guaranteed by the Constitution, provided the right to resort to the Courts shall not be suspended." This right to judicial redress, however, was immediately undermined by the Defence of the Sudan Ordinance, which authorizes the suspension of the ordinary legal system "in the event of invasion, insurrection or other [military] circumstances," replacing it instead with trial by courts-martial (Section II, paragraph 4). Together, these two laws exposed a gaping weakness in Sudan's constitutional system, supplying Numayri with a legal justification to radically transform the judiciary.[58]

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[56] The suspended constitutional articles were 40-42, 48-52, 58, 66, 67, and 79. "Republican Order to Declare a State of Emergency in the Country," *Al-Ṣahāfa* April 30, 1984, p. 1.
[57] "Tragedy in Omdurman" *Sudanow* April, 1984, p. 10.
[58] The potential for executive abuse of the State of Emergency became an important topic of scholarly debate following the 1985 overthrew of Numayri. For discussion in case law of the justification, scope, and judicial limits of executive powers during emergency, see in particular

Later that year, he sought to legitimate the state of emergency religiously as well. During a speech before an international conference of Islamic scholars and activists, Numayri first compared himself to Muhammad, who he said declared a state of emergency in Mecca just prior to his triumphant return to that city in 628. The Prophet had spent the last six years in Medina, having been forced to flee Mecca after its political leadership rejected his message. Though his return to the city was largely peaceful, he did not wish to risk causing any unnecessary bloodshed. Therefore, he sent word on ahead that anyone wishing to avoid harm could either remain in his or her own home, the home of the Muslim convert Abu Sufyan, or seek out sanctuary in the Ka'aba. According to Numayri, this delineation of Mecca into zones of safety and of violence was "the first declaration of a State of Emergency in Islam, whose Qur'an tells us to always be on our guard."[59]

The second incident he referenced was the decision by Abu Bakr, the first caliph and father-in-law of Muhammad, to launch the so-called Ridda Wars in 634. Following the Prophet's death two years earlier, many of the Arab tribes that had converted to Islam refused to recognize Abu Bakr's authority or render to him the *zakāt* tax they had sworn to Muhammad they would pay. As a result, they were declared to be apostates, and over the next two years were subjugated by the emerging Islamic state. Numayri took this familiar story of betrayal and retribution and adapted it for his own purposes, arguing that the Ridda Wars were as much about internal threats as external ones:

> For what were the Ridda Wars but a declaration of emergency to protect the Muslim community from the inside and from itself? You may recall that it was an argument made by opponents of those wars that the enemy might seek to harm [Mecca and Medina] while the Muslims were out fighting each other. Much like then, oh Brothers, here we declare a state of emergency to fight the coming enemy. We cannot repel an external

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Government of Sudan v. Abu al-Qasim Muhammad Ibrahim & Others (1986) and *Deing Deing & Others v. Eastern Region Commissioner* (1988). See also the analysis of Makec, J. W. (1988). "The Basic Principles on the Independence of the Judiciary." *SLJR*, 61-72 and (1990). "The Judicial Review of Administrative Decisions in Sudan." *SLJR*, 3-34. Another (non-Sudanese) source frequently cited in these cases and articles is Al-Tomawi, S. (1998). *Al-Niẓariyya al-'Ama lil-Qarārāt al-Idāraiyya*. Cairo: Dar al-Fikr al-Arabi.

[59] Numayri, J. M. (1984) *'Aām 'Ala Taṭbīq al-Sharī'a al-Islāmiyya fī al-Sūdān*. Omdurman: Majlis al-Sha'b, 27.

> military attack without also protecting the community of believers from defamers and outlaws through the value of manners and security.[60]

What this description of emergency reveals is that Numayri was far more concerned with an internal threat than an external one. While he may have used the Libyan bombing as a pretext, his attention was firmly fixed on those within Sudan's own borders, those who might seek to undermine Islam and threaten his rule. Moreover, his attempt to associate himself with the Prophet Muhammad and his companions points toward a sense of his own transcendent legitimacy, that his suspension of the Constitution was done in the service of a justice superior to any the judiciary might plausibly deliver on its own. It is in this light, therefore, that we should understand Numayri's decision to establish a network of emergency courts, later renamed Courts of Prompt Justice. Far from undermining or constraining the judiciary, their creation expanded judicial power to a level unrivalled at any time in Sudan since the end of the era of colonial rule, all in the name of protecting the country from those who would divide and weaken it.

Courts of Prompt Justice

The actual formation of the emergency courts was announced on May 1st, just days after the declaration of emergency itself. According to Numayri, they were designed to enforce the emergency regulations, speed the implementation of the September Laws, and take whatever other judicial actions were necessary to maintain public security. Initially, nine courts were formed, all based in Khartoum and each presided over by three judges, though provincial governors were ordered to follow suit as soon as possible. Later, the number of courts in Khartoum was increased to twelve. While it was stipulated that the chief judge of each court was to possess legal training, the other two members could be drawn from among officers of the military, the police forces, the security apparatus, and the prisons – and indeed, each of the nine Khartoum-based courts featured judges drawn from these non-legal institutions.[61] These courts were the direct successors to the quasi-judicial institutions established in Sudan during the early

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[60] Ibid 27-28.
[61] "Announcement of the Formation of Emergency Courts" *Al-Ṣahāfa* May 2, 1984, p. 1.

1970s discussed in Chapter Four – the revolutionary courts and state security tribunals that Numayri had used to fragment and undermine the civil judiciary's independence. Thus, in addition to addressing the severe shortage in judges, this loosening of judicial standards served to further undermine the legal profession's lock on the administration of justice in the national judiciary. It also comports with the argument, advanced most famously by Turabi[62] but echoed by Numayri,[63] that important legal and political knowledge was dispersed among a wide range of citizens, and was not strictly the purview of lawyers and judges.

According to an explanatory note distributed by the government, the emergency courts were given jurisdiction over essentially three different categories of crimes.[64] First, they were empowered to hear all cases relating to crimes against the state and public security. This included "fomenting hatred against the state, spreading false news in order to damage security, stability, or public peace, or inciting sectarian strife between citizens." Also listed were crimes relating to the armed forces, including incitement to rebellion, desertion, or disobedience. By and large, these were all crimes under articles 104 to 114 of the Penal Code. Second, the courts were given jurisdiction over crimes stemming from the passage of the September Laws. These included prostitution and other sexual offences, as well as the sale, purchase, or transport of alcohol. However, the majority of crimes handed to the Emergency Courts fall into the third category of what we might call economic or market-based offenses. Chief among these was smuggling, as well as hoarding and price gouging.

Emergency justice was, more often than not, swift and spectacular. Sentences were carried out immediately, often in the hallway or lobby of the courthouse. By the end of the first week, Sudan's two daily newspapers, *Al-Ṣahāfa* and *Al-Ayām*, were publishing on their first two pages a summary of the previous day's most notable trials, replete with the names of the defendants and a description of their sentences. Popular punishments included fines, flogging, and brief prison sentences (e.g. one to three

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[62] Turabi, H. (1983). "The Islamic State." In *Voices of Resurgent Islam*. J. Esposito. Oxford: Oxford University Press, 241-251.
[63] Numayri 1980, 389-417.
[64] "Explanatory Note for Emergency Order 1984 on the Formation and Procedure of the Emergency Courts" *Al-Ṣahāfa* May 2, 1984, p. 7.

months). Much less common were amputations and cross amputations (the amputation of one hand and the opposite foot), an operation that was carried out in public by a physician. There is no reliable figure on the number of amputations carried out in Sudan during this period, but some estimates put it at upwards of one hundred and twenty-five.[65] The first death sentence was handed down on June 15th, and approved by the President two days later.[66] Hanging seems to have been the most popular method of execution, but there is at least one instance in which the body of a defendant was ordered crucified after death.[67]

This parade of atrocities was not without its purpose. The speed, immediacy, and brutality of the emergency courts served to emphasize the inevitability of justice under Numayri. Unlike the traditional (non-emergency) courts, judges in the emergency courts had little patience for procedural niceties. Their justice was meant to be as direct and intuitive as possible, such that judgment and punishment were experienced as single, unified act. Everything was done to strip the trials to their bare essentials, with relaxed evidentiary standards, minimal paperwork and record keeping, and a vaguely defined reservoir of "reserve powers" they could draw upon in order to conduct their trials with speed and "procedural ease."[68] In fact, there was not even any means of appeal in the emergency court system until July, around the same time that they were renamed Courts of Prompt (or Instantaneous) Justice.

As for the non-emergency courts, they were left to carry on as before, but with duties limited to clearing their case backlog and dealing with civil matters. Even these responsibilities were gradually transferred to the Prompt Justice courts, which in late June began hearing civil disputes as well.[69] At first, the Chief Justice of the High Court, Sayyed Dafallah Haj Yousef, attempted to compete with the Prompt Justice courts, both in speed and in zeal to implement *shari'a*. Vowing to undertake a "comprehensive

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[65] "Amputees Plea for Help" *The Sudan Times* November 26, 1986, p. 1.
[66] "The President Supports the First Death Sentence by Hanging for the Crime of Adultery [zina] by an Emergency Court" *Al-Ṣahāfa* June 17, 1984, p. 1.
[67] Peters, R. (2005). *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*. Cambridge: Cambridge University Press, 167-168.
[68] "Explanatory Note for Emergency Order 1984 on the Formation and Procedure of the Emergency Courts" *Al-Ṣahāfa* May 2, 1984, p. 7.
[69] "Civil Emergency Courts Begin Their Work" *Al-Ṣahāfa* June 17, 1984, p. 1.

rationalization" (*al-tarshīd al-shāmal*) of the judiciary, he swore that his judges would cancel all their vacations, work longer hours, and prioritize moral and economic crimes. However, this promise of procedural "rationalization, simplification, and abbreviation" failed to impress Numayri, and the growth of the Prompt Justice system continued unabated.[70]

The Possibility of Judicial Independence during an Age of Reform

Did this and the two earlier waves of judicial reform empower the judiciary by granting it new capabilities and jurisdictions, or weaken it by establishing a parallel court system with which it was forced to compete? Favoring the latter option, Ibrahim Zein makes a sharp distinction between the non-emergency courts and the Prompt Justice courts. This distinction allows him to frame the political crisis of the period as one in which the executive used the Prompt Justice courts to undermine the power and independence of the judiciary.[71]

Ultimately, however, it is not clear that this distinction can be maintained. There was more overlap of methods, resources, and personnel between the two judicial networks than Zein suggests. This was especially true after the lifting of the state of emergency in September of 1984, at which point many leading judges of the Prompt Justice courts were transferred to the High Court, criminal courts, and criminal courts of appeal. Quite naturally, these men brought to their new jobs the same political commitments and contempt for procedure that they had acquired in their old positions. The line between the two court systems was erased entirely with the passage of the Judiciary Act of 1984 later that month, which transformed the Prompt Justice courts into criminal courts and integrated them into the judicial hierarchy. At the same time, a new Administrative Court system was created to conduct corruption trials of public officials, again staffed largely by former judges of Prompt Justice courts.[72]

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[70] "The Judiciary Mobilizes Its Agencies for Reform and Comprehensive Rationalization" *Al-Ṣahāfa* May 3, 1984, p. 1.
[71] Zein, I. (1989). "Religion, Legality, and the State: 1983 Sudanese Penal Code," (PhD diss., Temple University), 213.
[72] Ibid 225-231.

Contra Zein, therefore, the Prompt Justice courts did not so much compete with the judiciary as colonize it, until such point as they were a fully integrated whole. For that final year of Numayri's rule, the Sudanese judiciary was transformed into an enormously influential political institution, arguably one of most powerful in the country. Unfettered by procedural rules and legal technicalities, these judges brought with them a new level of juridical power and decisiveness. More than anything else, this was a power borne of informality, since it was only by acting directly, immediately, and intuitively, including by accessing the uncodified *shari'a* referenced in the Judgments (Basic Rules) Act, that the courts achieved their "instantaneous" justice. And while such judicial empowerment and autonomy might have alarmed Numayri had it occurred in the first half of his rule, the reforms of the second half introduced into the judiciary a cohort of judges far more sympathetic to his agenda and compliant toward the regime. This is not to suggest that the two always saw eye to eye – for instance, the abolition of usury no doubt took many in government by surprise. Nevertheless, the new judiciary, in which *qāḍīs*, military officers, and security personnel were able to wield the same powers as a duly appointed graduate of the University of Khartoum Faculty of Law, was a judiciary far less likely to challenge the regime.

V. Conclusion

After the fall of President Ja'far Numayri in April of 1985, a great campaign was launched to hold the members of his inner circle responsible for their actions during the sixteen-year rule of the May Regime. Near the top of that list was Baha al-Din Muhammad Idris, better known to the public as "Mr. Ten Percent" because of the percentage he was said to have skimmed off the top of every deal he brokered while in office. Baha al-Din, a zoologist by training and one-time lecturer at the University of Khartoum, had served in various ministries for much of the 1970s and eventually rose to become a close friend and advisor to the president, over whom he exercised significant influence. His flamboyant style and famous acquaintances, particularly his association

with the Saudi billionaire playboy Adnan Kashoggi, generated widespread media coverage and transformed him for many into the face of government corruption.[73]

Baha al-Din's trial, which was presided over by a state security court because of the sensitive nature of the charges and the unsettled status of the rest of the judiciary, lasted for more than three months and was the object of enormous public interest.[74] Over the course of more than two dozen sessions, thirty-three witnesses were called to testify and one hundred and twenty-eight different documents were entered into evidence, as the state prosecutor attempted to prove that Baha al-Din had made millions in corrupt dealings involving everything from manipulating the cotton market to attempts to sell the national airlines. Each day's events were closely followed in radio, television, and newspapers, culminating in a highly anticipated verdict. Sensing, perhaps, the enormous audience for this moment of judicial power and eager to explain why the trial had been so long and exhaustive, Judge Muhammad Abd al-Rahim Sobhi prefaced his reading of the verdict with a few remarks on the nature of law and the state of the Sudanese judiciary:

> Though the people grew weary of it, we intentionally held our patience during this [trial], as we wanted our colleagues among the prosecution and the defense to have what they felt to be a fair hearing in what is one of the premier cases of an era when our country suffered under an autocracy that made us live like cattle instead of men….We would like to take advantage of this opportunity to thank the prosecution and defense for all their effort and endurance through so many hardships throughout these proceedings. [They acted with] patience, mutual respect, and in an atmosphere free of tension, calling to mind the memory of the era of the Sudanese judiciary's first generation, after we had almost come to believe that it had passed forever, never to return during our lifetimes.[75]

Coming so soon after the fall of Numayri and in the context of Baha al-Din's trial, Judge Sobhi's remarks represent something more than just boilerplate self-congratulation by a newly independent court. They are also an assertion of a certain kind of justice, one

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[73]Bashiri, M. (1992). *'Adām Sha'b?*. Damascus: Al-Maktabah al-Thaqafiyyah, 178-179.
[74] This case was heard on appeal by the Supreme Court some months later. See *Government of Sudan v. Baha al-Din Muhammad Idris*, 1986.
[75] Riyad, H. ed. (1987). *Ashar al-Muḥākamāt al-Siyāsiyya fī al-Sūdān: Istaglāl al-Nufuth, Tahrīb al-Falāsha, al-Igtiyāl al-Siyāsī, al-I'tiqāl al-Taḥafuzī*. Beirut: Dar al-Jil, 10.

characterized by a specific array of procedures and judicial expertise. What the judge was articulating, and what his Sudanese audience would have immediately understood him to be referencing, was a notion of the law grounded in procedure, deliberation, and formal rules. His own example during Baha al-Din's trial, as well as his invocation of "the Sudanese judiciary's first generation", presents an implicit contrast with the sort of law administered during the final years of Numayri's regime, when "prompt justice" and rapid judicial innovation lent an immediacy to law that the post-Numayri judiciary would explicitly refute. Thus, Baha al-Din's trial represents a reassertion of judicial power in two ways. First, it was a reminder that no person, however powerful or well connected, was above the law, a claim repeatedly made during this and other major political trials carried out following the May Regime's fall.[76] But second – and, I think, more interestingly – it was a claim about the *kind* of trials capable of producing justice; namely, a trial characterized by deliberation, patience, and formality. As such, Sobhi was responding to what had been Numayri's main critique of the civil judiciary – that it was slow, artificial, and profoundly disruptive to the fabric of social life.

Yet the changes that Judge Sobhi was referencing would prove to be far more enduring than anyone could have predicted in those heady days following the revolution. The September Laws were suspended, but not repealed. The structural changes to the judiciary would never be reversed. Within four years, Sudan's third period of democratic rule succumbed to the same fate as its predecessors and was overthrown by a military coup, this time at the hands of an army brigadier named Umar al-Bashir. The new regime that came to power included Turabi as one of its chief ideologues, as he had somehow managed to weather the turmoil of Numayri's fall and democracy's collapse. With Bashir's support, Turabi was appointed Speaker of the National Assembly in 1996, a position from which he and his followers were able to preserve the place of *shari'a* in the nation's legal system, even at the cost of prolonging the regime's civil war with the south. Meanwhile, the structural changes that Numayri began in 1980 were formalized in

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[76] Other prominent members of the May Regime to be tried include former energy minister Sharif al-Tuhami, former first vice-president Umar Muhammad al-Tayeb, and a number of military officers who had participated in the 1969 coup. Numayri himself, meanwhile, fled to Egypt where he successfully fought extradition to the Sudan.

the 1991 Criminal Code and the 1998 Constitution, both of which have remained in force to this day, as do many of the same judicial procedures and principles first put in place by Numayri during his judicial revolution.[77]

The judicial reforms of the 1980s have a contradictory legacy. They mark a profound break with established judicial structure and practice, but they also stand as a point of continuity with earlier regime attempts at judicial transformation. To many judges, they represent an all-out assault by Numayri on judicial independence, but they also transferred to the courts an array of new powers, flexibility, and personal discretion far in excess of anything the courts had enjoyed at any point earlier in Sudan's colonial or post-colonial history. Ultimately, it is impossible to fully measure or describe the scope of the transformation wrought on the judiciary by the regime during the 1980s. Numayri's judicial revolution serves as a sort of bookend for the divisions, arrangements, and legal philosophies established by the British colonial regime during the turn of the nineteenth century, and as such will likely be debated by scholars for many decades to come. As this chapter has attempted to show, however, any analysis must contend with the fact that Numayri's reforms, shaped both by material concerns and ideational commitments, fundamentally upended the regime-judiciary relationship in Sudan, empowering the courts and changing the very nature of the law.

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[77] An-Na'im, A. A. (2006). *African Constitutionalism and the Role of Islam*. Philadelphia: University of Pennsylvania Press, 133-138.

CHAPTER SIX: CONCLUSION

I. Major Findings

Until quite recently, scholars of comparative politics were prepared to dismiss the role of law and judicial institutions in authoritarian regimes. They believed, not unreasonably, that political power under authoritarianism was almost exclusively concentrated in the hands of the executive branch, and therefore that judges and lawyers enjoyed little actual power or independence. As one prominent scholar of judicial politics has argued:

> It is hard to imagine a dictator, regardless of his or her uniform or ideological stripe, (1) inviting or allowing even nominally independent judges to increase their participation in the making of major public policies, or (2) tolerating decision-making processes that place adherence to legalistic procedural rules and rights above the rapid achievement of desired substantive outcomes. The presence of democratic governments thus appears to be a necessary, though certainly not a sufficient, condition for the judicialization of politics.[1]

In recent years, however, this view of judicial politics under authoritarianism has been decisively rejected. A wave of new research, often called the "Rule by Law" literature, has persuasively argued that strong and independent judiciaries can exist alongside authoritarian regimes.[2] One of the primary purposes of this dissertation has been to apply the insights of this literature to the Sudanese case, while also departing from it in certain key respects. I have argued that judicial strength and independence emerged in Sudan for three reasons: (1) Regime elites encouraged strong and independent judicial institutions as a way to maintain public security, reduce bureaucratic inefficiencies, and manage political activism; (2) Judicial actors themselves took advantage of regime weakness and political fragmentation to assert their authority and

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[1] Tate, C.N. (1995). "Why the Expansion of Judicial Power." In *The Global Expansion of Judicial Power*. C.N. Tate and T Vallinder. New York: New York University Press, 28.
[2] Balasubramaniam, R. R. (2009). "Judicial Politics in Authoritarian Regimes." *University of Toronto Law Journal* 59(3): 405-415; Ginsburg, T. and T. Moustafa, Eds. (2008). *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge: Cambridge University Press.

autonomy; and (3) The influence of historical and ideational factors, including ideologies of legalism and Islamism, encouraged state and civil society actors to view judicial strength and/or independence as politically necessary.

As this dissertation has noted, however, a strong and independent judiciary also poses a potential threat to the regime. One of the central dynamics that it has sought to capture, therefore, has been the conflicting impulse present in the regime-judiciary relationship throughout twentieth century Sudan. On the one hand, successive regimes came to appreciate that a strong and independent judiciary could help them achieve their objectives and secure their interests. On the other hand, such a judiciary was also a potential source of opposition and a threat to their rule. The challenge for Sudan's regimes, therefore, has been to devise an arrangement whereby the judiciary possessed the strength, flexibility, and autonomy necessary to quickly and decisively achieve regime goals, while still ensuring that it would not use it strength or autonomy to aid the political opposition. Sudan's regimes have attempted to resolve this challenge in two primary ways: (1) They have sought to create or cultivate among judicial personnel various legal ideologies designed to ensure their loyalty to the regime, including notions of "tribal discipline" (Chapter Two) and legalism (Chapter Three); and (2) They attempted to take advantage of Sudan's legal pluralism and judicial fragmentation by playing various judicial and quasi-judicial institutions off of one another. Depending on the needs of the moment or a ruler's perceptions about which judicial institution was most likely to pose a threat to his reign, the regime would transfer power and autonomy from one set of institutional actors to another, whether those actors be tribal leaders (Chapter Two), civil judges (Chapters Three and Four), or a mix of civil and religious judges (Chapter Five).

This last point, however, points to one of the great difficulties with studying the regime-judiciary relationship in Sudan and is one of the central insights of this dissertation – namely, that there is no *single* regime-judiciary relationship at all. This understanding of judicial politics in authoritarian regimes departs from that of the Rule by Law literature, wherein a more unitary model of regime-judiciary relations is presented. Due to the deeply pluralistic nature of the Sudanese legal landscape, there are in fact multiple regime-judiciary relationships, each with its own array of institutional

arrangements and ideologies. Observers of Sudan have frequently taken this fragmented judicial space to be a sign of state weakness or failure, associating state strength with a unified judicial apparatus. What this dissertation has labored to show, however, is that because of its extreme legal pluralism, Sudan's regimes have been able to adopt multiple judicial strategies at any given moment, each designed to address a different problem or the needs of a specific community. This has made it possible for the regime to promote judicial power and independence across one set of institutions, while simultaneously discouraging them in another. As a result, the fragmented nature of judicial politics in Sudan should not necessarily be understood as a sign of state weakness – on the contrary, in many cases it is the product of explicit regime design. By presenting a more nuanced model of multiple regime-judiciary relationships, this dissertation is able to better capture the complex interplay of forces, interests, ideas, and institutional arrangements that are present at the point where politics and law meet.

One example of this complexity was explored at length in Chapter Two. During the period of Native Administration, the British colonial regime empowered the network of "native courts" that populated the Sudanese countryside. By shifting judicial power from the state's civil courts to these customary ones, the regime hoped to streamline the administration of justice and undermine the nationalist movement of Sudan's cities. Importantly, however, this policy depended on endowing the native courts with a certain measure of procedural flexibility and independence, or else they would not be able to respond quickly enough to new and unexpected threats to colonial rule. In order to achieve this, British administrators adopted a policy of "strategic ambiguity", in which native authorities were explicitly discouraged from rendering their judicial practices "legible" to the colonial state. Thus, even as law and judicial institutions in major urban centers were subject to a rigorous project of codification and formalization, those in more rural areas were encouraged to leave their law and judicial procedures essentially ambiguous.

This points to another significant finding of this dissertation: that the colonial and post-colonial state need not necessarily be a force for legal codification and formalization. Many scholars have argued otherwise, claiming that the formalization of legal authority and the codification of non-Western law, whether it be *shari'a* or local

custom, is inherent in the logic of the modern state. But as was shown with the discussion of customary law in Chapter Two and Islamic law in Chapter Five, Sudan's regimes have permitted, and at times even *encouraged*, judicial institutions to make use of uncodified law. For instance, because of the structure of the September Laws implemented by the Numayri regime in 1983, Sudan's judges were able to reach beyond the text of a given statute and access the "uncodified *shari'a*" that the country's legislators had not seen fit to incorporate into statute. Putting this access to immediate use, the judiciary declared apostasy (*ridda*) to be a crime and banned usury (*ribā*) – two legal judgments with no basis in regime legislation. By permitting the judges to access the uncodified *shari'a* in the absence of any explicit provision to the contrary, the Numayri regime vastly expanded the scope of judicial power and autonomy in Sudan.

Finally, this dissertation has argued for the importance of ideology for understanding the regime-judiciary relationship(s). While legal pluralism and judicial fragmentation allowed successive regimes to pick and choose which judicial institutions to empower and which to undermine, these choices were not simply the result of rational-strategic calculation. Rather, regime decision-making was produced within a specific historical and ideational context, one in which some judicial institutions and personnel came to be regarded as more trustworthy or effective than others. Thus, the British colonial regime believed that native courts could be entrusted to wield judicial power responsibly because their "tribal discipline" would prevent them from exceeding any pre-determined boundaries (Chapter Two). Likewise, the Numayri regime believed that by implementing *shari'a*, the Sudanese legal system would be brought into alignment with basic human nature and sentiment, rendering the judiciary more efficient and responsive to the country's needs (Chapter Five). In both cases, we see how historical and ideational factors helped shape which sorts of judicial institutions were trusted by the regime and which were not.

II. Sudan in Comparative Perspective

As an example of how regimes and judicial institutions interact under colonial, authoritarian, and democratic rule, the Sudanese case presents several lessons for scholars of comparative judicial politics. First, the weakness of the Sudanese state distinguishes it

within the literature on authoritarian judiciaries, a body of scholarship in which strong states continue to figure prominently. Indeed, almost all of the most influential case studies in the authoritarian judiciaries literature have been about strong Latin American and Eastern European states, particularly Chile,[3] Argentina,[4] and Russia.[5] While in recent years scholars have begun to expand their geographic scope to include Asian and African cases, the states selected for analysis tend to still be among the more powerful and centralized, such as Egypt,[6] Singapore,[7] and Turkey.[8] Because of this focus in the existing literature toward strong states, scholars have tended to universalize the regime strategy of using the judiciary to centralize authority and formalize law. As we have seen in this dissertation, however, the regimes in Sudan have behaved considerably differently. Their example should prompt scholars to reconsider how generalizable their theories of judicial politics truly are. It also points to the need to reevaluate notions of state "strength" and "weakness", since much of what is commonly taken as evidence of the Sudanese state's weakness is the product of strategic policy.

A second key lesson from the Sudanese case involves the relationship between judicial fragmentation and judicial independence. As was explored in Chapter Five, the Numayri regime used the special emergency and "prompt justice" courts as a way of ensuring judicial loyalty. Whereas quasi-judicial institutions were first established by the

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[3] Barros, R. (2002). *Constitutionalism and Dictatorship*. Cambridge: Cambridge University Press; Hilbink, L. (2007). *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge: Cambridge University Press.

[4] Helmke, G. (2005). *Courts under Constraints: Judges, Generals and Presidents in Argentina*. Cambridge: Cambridge University Press; Pereira, A. W. (2005). *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina*. Pittsburgh: University of Pittsburg Press.

[5] Popova, M. (2012). *Politicized Justice in Emerging Democracies: A Study of Courts in Russia and Ukraine*. Cambridge: Cambridge University Press; Soloman, P. (1996). *Soviet Criminal Justice under Stalin*. Cambridge: Cambridge University Press.

[6] Brown, N. (1997). *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*. Cambridge: Cambridge University Press; Moustafa, T. (2007). *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*. Cambridge: Cambridge University Press.

[7] Silverstein, G. (2008). "Singapore: The Exception that Proves the Rule." In *Rule by Law: The Politics of Courts in Authoritarian Regimes*. T. Ginsburg and T. Moustafa. Cambridge: Cambridge University Press.

[8] Shambayati, H. and E. Kirdis (2009). "In Pursuit of 'Contemporary Civilization': Judicial Empowerment in Turkey." *Political Research Quarterly* 20(10): 1-13.

civilian governments of Sudan's "second democratic interlude" as a way of slowing the expansion of judicial power into the civil service (Chapter Four), under Numayri they became a training ground for compliant and loyal judges. When this parallel judicial network was unified with the civil judiciary in the 1980s, these more pliable judges quickly transformed the courts into a reliable regime ally.

This understanding of the role of parallel judicial networks, in which they serve to tame the judiciary and win its loyalty, stands in contrast to the way they have been understood in much of the existing scholarship. Jose Toharia, for example, has famously argued that the Franco regime in Spain created special courts as a way of insulating the traditional judiciary from political interference. By channeling controversial or politically sensitive cases from the traditional courts to the parallel judicial network, Franco was content to leave the independence of the traditional judiciary essentially undisturbed. In this way, he was able to enjoy all of the benefits of an independent judiciary with few of its drawbacks.[9] Toharia's analysis remains common throughout the literature and his interpretation of parallel judicial networks is widely cited.

But as Nicholas Cheesman has pointed out in his study of judicial politics in Burma, parallel judicial networks can also be used to undermine or end judicial independence, provided that some transfer of personnel or precedents from the special courts to the traditional ones can be carried out.[10] In many respects, the Sudanese case supports Cheesman's conclusions. This suggests that scholars of comparative judicial politics cannot look at a single branch or division of a country's judiciary in isolation from all others. In countries with multiple judicial networks, we are likely to see attempts by both the regime and judicial actors themselves to arrange the institutional landscape to their benefit. Therefore, understanding how these judicial networks interact with one another is at least as important as understanding how any one of them relates individually with the regime.

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[9] Toharia, J. J. (1975). "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain." *Law & Society Review* 9(3): 475-496.
[10] Cheesman, N. (2011). "How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence." *Law & Society Review* 45(4): 801-830.

At the same time, the reality of judicial fragmentation and legal ambiguity means that judicial independence is never a straightforward concept. As in Burma, the transferring of loyal judicial personnel into the courts sharply constrained both the judiciary's ability and desire to oppose the regime. Yet the fact that this transference occurred within a larger project in which judges were granted new powers and abilities, *including the ability to produce and apply law independently of the legislature*, complicates any attempt to paint Numayri's reforms as a simple assault on judicial independence. There are more dimensions to judicial independence than the comparative literature generally acknowledges, something the Sudanese case dramatically illustrates.

A third lesson of this dissertation has to do with the role of courts in ensuring the loyalty of authoritarian elites to the regime. Scholars of authoritarianism have long believed that elections, political parties, and legislatures are important for helping rulers overcome the so-called "dictator's dilemma" – that is, the challenge of maintaining elite loyalty and forestalling defections, while at the same time ruling through a non-democratic and largely unaccountable political apparatus.[11] How this is accomplished in practice, however, is the source of much disagreement in the extant literature. Lisa Blaydes, for example, has argued that elections in Mubarak's Egypt served as an allocation system designed to reward electoral candidates with access to rents in return for their public declarations of loyalty. In this way, elections helped to discourage elite defection and promote regime stability.[12] Jason Brownlee, by contrast, suggests that there is little relationship between authoritarian elections and regime stability. Instead, he argues that the primary source of elite cohesion in autocracies is the dominant political party, which gathers various elites together and creates the institutional space in which

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[11] Boix, C. and M. Svolik. (2013). "The Foundations of Limited Authoritarian Government: Institutions, Commitment, and Power-Sharing in Dictatorships." *The Journal of Politics* 75(2): 300-316; Geddes, B. (1999). "What Do We Know about Democratization after Twenty Years?" *Annual Review of Political Science* 2:115-144; Levitsky, S. and L. Way. (2010). *Competitive Authoritarianism: Hybrid Regimes After the Cold War.* New York: Cambridge University Press; Magaloni, B. (2008). "Credible Power-Sharing and the Longevity of Authoritarian Rule." *Comparative Political Studies* 41(4-5): 715-741.

[12] Blaydes, L. (2010). *Elections and Distributive Politics in Mubarak's Egypt*. New York: Cambridge University Press.

differences can be resolved.[13] Finally, Joseph Wright and Abel Escriba-Folch have argued against both positions, and sought instead to establish a distinction between authoritarian *legislatures* (which are conducive to regime stability) and authoritarian *political parties* (which are not). The reasoning behind this distinction rests in the fundamental publicity and visibility of legislatures, wherein it is possible for the ruler to monitor and bargain with rival elites. Members of a political party, by comparison, are dispersed throughout the entire country, and in fact may ultimately be a source of regime *in*stability due to the party's role in lowering the collective action costs for elites interested in organizing the regime's overthrow.[14]

Where in all these theories should we locate the courts? While it is widely acknowledged that the binding nature of constitutions and court decisions can help to reassure skittish regime elites that their rights and privileges will be preserved,[15] it is unclear how this strategy actually operates or what its potential drawbacks might be. For example, do rulers sometimes appoint rival elites to important judicial posts as a way of demonstrating their commitment to power-sharing agreements? If so, to which posts, and with what degree of independence? Do regimes use court decisions as mechanisms to identify and reward loyal elites? And considering the fact that courts operate both in private and in public – that is, they deliberate in private but are required to publicly state their reasoning – do they pose the same risks to regime stability that Wright and Escriba-Folch conjecture political parties do?

The Sudanese case is well positioned to address these questions. As we have seen in Chapter Five, Numayri sought to win the support of Hassan al-Turabi and his Islamic Charter Front by promising to implement Islamic law. By appointing Turabi as attorney general and installing numerous Muslim Brothers in high ranking positions on the bench, Numayri was trying to accomplish through the judiciary what many other rulers have sought to do through political parties, legislatures, and elections: creditably committing

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[13] Brownlee, J. (2007). *Authoritarianism in an Age of Democratization*. New York: Cambridge University Press.
[14] Wright, J. and A. Escriba-Folch. (2012). "Authoritarian Institutions and Regime Survival: Transitions to Democracy and Subsequent Autocracy." *British Journal of Political Science* 42(2): 283-309.
[15] Albertus, M. and V. Menaldo. (2012). "Dictators as Founding Fathers? The Role of Constitutions under Autocracy." *Economics & Politics* 24(3): 279-306; Barros 2002.

himself to a power-sharing agreement, while at the same time placing potential rivals in highly public, visible positions where their loyalty could be easily monitored. Yet while the courts' decisions may be public, their deliberations are not. Unlike in the legislature, therefore, where the ruler can easily monitor debate and stifle policy decisions with which he disagrees, the *in camera* deliberations of the courts affords him no such opportunity. Thus, the court's decision to ban *ribā* in the Lalitt Ratnalal Shah case took the Numayri regime entirely by surprise, leaving it with no alternative but to either comply or risk undermining its agreement with the ICF. This is a problem that regimes rarely face when dealing with legislatures, elections, or even political parties, and scholars of authoritarian judiciaries will need to take it into account. In this sense, the Sudanese case is highly instructive.

Finally, the role of judicial ideology in Sudan has often functioned in ways that differ markedly from how it has operated elsewhere. Lisa Hilbink, for example, has argued that during the Pinochet era in Chile, judges adopted an ideology of apoliticism. Under this ideology, any judicial decision that contradicted or refuted a regime policy was liable to be interpreted as inappropriate meddling by a judge in executive or legislative affairs. Thus, even though Chile's judges were formally empowered and insulated from regime interference, they were ideologically predisposed to show the regime an extraordinary degree of deference. As Hilbink puts it, challenging "the decision of the military junta, self-proclaimed guardians of the national interest, would both violate judges' professional duty to remain apolitical and imperil their chances of professional advancement."[16]

The Sudanese civil judiciary during the late colonial period developed a similar ideology of apoliticism (Chapter Three), but with several important differences that would contribute to its emergence in the 1950s and 1960s as arguably the single most powerful institution of the Sudanese state. First, the ideology of legalism, from which the courts' commitment to apoliticism was derived, was not simply imposed by the regime on the judiciary. On the contrary, many judicial and civil society actors were enthusiastic proponents of it as well. This was because each set of actors had a different notion of

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[16] Hilbink 2007, 226.

what legalism actually entailed. For the judges, it was understood to mean that the judiciary would be insulated from executive interference. For many civil society actors, it was used as a way of discouraging British judges from injecting themselves in the decolonization process. And for the regime, legalism was a useful alibi for disguising political acts as legal (and therefore apolitical and uncontroversial) ones.

A second key ideological difference between the Chilean case and Sudan has to do with the relationship between apoliticism and judicial independence. Whereas in Chile the apoliticism of the judiciary produced a strikingly passive and conservative institution, in Sudan it helped to generate widespread support for the principle of a judiciary insulated from executive meddling. As political actors in the late colonial period competed with one another to promote their preferred definition of appropriate judicial behavior, they all cited again and again the principle of judicial independence. Though their invocation of judicial independence was, in most instances, a covert way of setting the limits of acceptable political activism, it ultimately had the effect of generating widespread support for a judiciary free from political interference. This left the judiciary well positioned during the decolonization process to assume the role of protector of the constitution, guardian of the national interest, and rightful check on the excesses of the ruling regime. For a time.

III. Implications and Paths for Future Research

This dissertation has several implications for scholars of Sudan, judicial politics, and comparative authoritarianism. First, it undermines the widely held belief that democracies are necessarily more respectful of judicial independence than authoritarian regimes. On the contrary, the first concerted attempt to rein in the power of the civil judiciary in Sudan took place at the hands of a civilian government during the country's second democratic interlude. As a corollary to this, it is also noteworthy that members of the judiciary played a crucial role in bringing that experiment in democracy to an end and ushering into power the Numayri regime. While the notion that courts are a force for democratization and "horizontal accountability" is a deeply ingrained assumption among

scholars of democratic transitions,[17] the Sudanese case suggests that under certain circumstances, judicial actors may also help to undermine a transition and return the country to authoritarian rule. Indeed, because judiciaries during transitions are typically staffed with personnel appointed by the previous regime, they often function as "authoritarian enclaves" that survive the collapse of authoritarianism itself, preserving regime policies or shielding its leaders from democratic scrutiny.[18]

This was a dynamic on vivid display during Egypt's failed transition in 2013. Following the election of the Muslim Brotherhood-backed government of Muhammad Morsi the previous year, elements within the judiciary began a campaign to undermine the scope and legitimacy of the country's transition. This culminated in the Supreme Constitutional Court's decision to dissolve the lower house of the Egyptian parliament in June 2012, an action that precipitated a constitutional crisis leading directly to a military coup the following year. While the judiciary claimed that its actions were necessary to restrain the government's allegedly illiberal policies, many observers at the time accused the courts of trying to sabotage the transition and restore the so-called "deep state" of the Mubarak era.[19]

Going forward, therefore, it will be important for scholars to determine what factors determine whether a judiciary will facilitate or undermine the transition to democratic rule. In this regard, the Sudanese case seems especially promising for future research. Though the 1985 transition to democracy was not discussed in this dissertation, it is interesting to note that the judiciary adopted a largely deferential posture toward the newly elected democratic government that replaced Numayri. This stands in sharp contrast to its behavior following the 1964 transition that brought down General Abboud,

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[17] O'Donnell, G. (1999). "Horizontal Accountability in New Democracies." In *The Self-Restraining State: Power and Accountability in New Democracies*. A. Schedler, L. Diamond and M. F. Plattner. Boulder: Lynne Reinner.

[18] Domingo, P. (2004). "Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America." *Democratization* 11(1): 104-126; Fiss, O. M. (1993). "The Right Degree of Independence." In *Transition to Democracy in Latin America: The Role of the Judiciary*. I. P. Stotzky. Boulder: Westview Press; Magalhaes, P. C. (1999). "The Politics of Judicial Reform in Eastern Europe." *Comparative Politics* 32(1): 43-62.

[19] Brown, N. (2012). "Contention in Religion and State in Postrevolutionary Egypt." *Social Research* 79(2): 531-550; Lust, E., G. Soltan, et al. (2013). *Islam, Ideology and Transition: Egypt after Mubarak*. Unpublished manuscript.

when Sudan's judges intervened in political affairs in a way that destabilized the civilian regime. Future researchers, therefore, may well find Sudan useful for an in-case comparison of judicial strategies during transitions from authoritarianism.

A second important implication of this dissertation is that the relationship between state rule and legal standardization (or "legibility") may need to be reconsidered. This may be especially true for the study of modern Islamic legal reform. In *The Impossible State*, Wael Hallaq has argued that the notion of an Islamic state is "both an impossibility and a contradiction in terms."[20] This is because *shari'a*, the adoption of which Hallaq takes to be the mark of an Islamic state, is only viable within a decentralized and moral community in which legal authority is predicated on the sovereignty of God. Since the modern state, according to Hallaq, is characterized by the centralization of power, the separation of morality from politics, and the ultimate sovereignty of the nation-state, the goal of an Islamic state can never be fully realized.

Yet it may be the case, as some reviewers of Hallaq's book have argued, that the modern state is both more diverse in its governing tactics and less sweeping in its political ambition than *The Impossible State* suggests.[21] Andrew March, for instance, disputes the idea that the modern state is necessarily committed to establishing its sovereignty over each citizen's ethical subjectivity. Hallaq's mistake, he claims, is that he does not take seriously "the distinction between morality (what we owe others as a matter of justice) and ethics (care of the self), and thus does not discuss the possibility that any modern legal and political projects might aim at morality in the former sense while acknowledging multiple ethical projects in the latter sense. There is no recognition that in modernity there might be reasonable disagreement about ethics, even for Muslims or those living in Muslim countries."[22] Thus, the ethical ambition of the modern state

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[20] Hallaq, W. (2013). *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*. New York: Columbia University Press, ix.
[21] Brown, N. (2014). "Review Symposium: The Impossible State." *Perspectives on Politics* 12(2): 464-465; March, A. F. (forthcoming). "What Can the Islamic Past Teach Us about Secular Modernity?" *Political Theory*, 1-10; Odeh, L. A. (2014). "Review of Wael Hallaq, 'The Impossible State: Islam Politics, and Modernity's Moral Predicament'." *International Journal of Middle East Studies* 46(1): 216-218.
[22] March forthcoming, 6.

may be considerably more modest, and therefore more compatible with Hallaq's "paradigmatic" version of *shari'a*, than his book suggests.

This dissertation makes a similar argument regarding the *epistemic* ambition of the modern state. First in its discussion of customary law and then again in its engagement with Numayri's September Laws, it has claimed that the Sudanese state intentionally discouraged "excessive" centralization of legal authority and codification of legal knowledge, believing that a flexible judiciary was also a more useful and innovative one. To be sure, the self-proclaimed Islamic republic established by Numayri bears little resemblance to the sorts of pre-modern Islamic polities Hallaq claims existed prior to European colonization, but nor can it be denied that the decisions reached by Sudan's judges were frequently based on uncodified, informal, and intensely moral law. This sort of regime strategy, in which the state's knowledge of law is indirectly proportional to its sovereignty, is most likely a feature of other countries as well. Scholars should proceed by acknowledging the oft-elided gap between the *rhetoric* of the modern state (which tends to resemble in its sweeping ambition the description given by Hallaq) and the far more diverse and uneven reality.

IV. Final Thoughts

Sudan is a remarkable country. One of the first African states to achieve independence from colonialism, it is also one of the only Arab countries to have practiced common law. With three democratic interludes totaling eleven years of elected rule, it has more experience with democracy than many of its neighbors, yet it has also fought one of the modern world's longest lasting and most brutal civil wars. In 1983, it joined Iran, Pakistan, and Saudi Arabia by launching an ambitious attempt at applying Islamic law in the age of the nation-state, and then in 2010 shocked many observers by allowing its southern third to secede after a successful referendum, forming in the process two of the world's newest states.

Yet for all the foregoing, Sudanese politics – especially its *legal* politics – remains remarkably understudied. There is still much we do not understand about the structure of its institutions, their prevailing legal ideologies, and their relationship to regime and civil society actors. This dissertation is a small contribution toward correcting that oversight.

In the process, it has attempted to shed light on a number of global trends, including the persistence of authoritarianism, the resurgence of religious law, and the judicialization of politics. None of these trends show any sign of diminishing, however, including in Sudan. For that reason, much more work remains to be done.

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