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The Rule of Law and Authoritarian Rule: Legal Politics in Sudan

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MARK FATHI, MASSOUD. 2013. *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*. Cambridge University Press. Pp. xxii + 265. $109.99 cloth, $34.99 paper.

Does the rule of law guarantee peace and democracy, as so many people in the development and governance field believe? What are the historical and sociocultural conditions that shape the way rule of law mechanisms work in practice? Mark Massoud's monograph tracing the changing dimensions of the rule of law in Sudan from its colonial period to the present offers an important perspective on these questions, casting doubt on the simple argument that the rule of law produces democracy and peace. Instead, he shows how colonial and authoritarian rulers used the rule of law to consolidate power and legitimate their rule. In Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan, *Massoud develops the concept of legal politics, arguing that the way the rule of law works varies with the political system in which it is embedded. He concludes that the forms of legal politics that reinforce the power and authority of legal institutions are more likely to sustain an authoritarian state than to bring democratic rule. His analysis is a valuable caution to those who promote the rule of law as the salvation for all. Taking a sociolegal perspective, he shows how it works in practice.*

European colonial powers typically introduced their own rule-of-law systems to the places they colonized, layering a new legal order on top of the already existing systems of law. Was this the gift of civilization and order to peoples racked with violence, as many of the colonial powers argued? Was it a means of conquest and resource extraction, what Mattei and Nader refer to as plunder (2008)? Or was it something in between? This question is of particular significance today, as development agencies, private donors, and international financial organizations increasingly emphasize the importance of developing the rule of law as part of the development agenda. Yet, this is proving a difficult if not impossible task. The historical experience of colonial rule-of-law schemes offers important insights for the present moment. British and even US colonialism succeeded to some extent in introducing the rule of law, yet the consequences were often tragic.

Mark Massoud's book sheds important light on this complicated yet critical issue. His historical account of the impact of colonial rule-of-law systems, in conjunction with postcolonial political changes, suggests that, in a limited way, the British succeeded in establishing a rule of law during the colonial era, but that this mechanism was used in very different and often antidemocratic ways in later

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periods. Clearly, the rule of law is a set of techniques that can be mobilized in a variety of ways by whoever has the power to use them. As Martin Krygier points out in his essay in this symposium, there are competing and contradictory theoretical positions about the impact of the rule of law on justice.

In the face of contemporary enthusiasm for the rule of law as an antidote to violence and a means to create democracy, Massoud shows that the impact of the rule of law depends greatly on the social, cultural, and historical conditions under which it operates. His study of the rule of law in Sudan provides valuable insight into what the rule of law can and cannot accomplish and under what conditions. As a sociolegal scholar, Massoud anchors his analysis of law and legal institutions within the social and political context of Sudan and its complicated colonial history. While recognizing that law can and does constrain power, Massoud's careful study of the historical development and contemporary use of law in Sudan shows that here it is largely a political tool available to those able to use it. Fragile states such as Sudan do not lack law; instead, law is everywhere, but put to use by those with the resources and skills to do so. Although this may occasionally be the poor, to a large extent those mobilizing the law are the elites, including authoritarian elites. As Massoud says, the rule of law does not inevitably produce democracy or peace. It can also buttress power in authoritarian states and confer legitimacy on authoritarian governments.

The colonial experience is clearly basic to the way rule of law works in the present. In the case of Sudan, Massoud shows that there were significant shifts in rule of law between 1898, when the British and Egyptians invaded the region and established colonial control, and 2011, when South Sudan seceded after a protracted civil war. This is an historical period marked by colonialism, authoritarian rule, civil war, and a mere ten years of democratic leadership. Massoud begins his book by quoting a well-respected Sudanese lawyer who tells him, poignantly, that a book about law in the Sudan would be "a very short one" (2013, 1). Instead, Massoud finds that law was central to the British colonial project and to the course of authoritarian rule in the independence period. The book examines how colonial, authoritarian, and humanitarian actors pursue what he calls "legal politics" over this period, focusing on colonial officials, British-trained Sudanese lawyers, postindependence rulers, and international human rights and development workers. All these actors mobilize legal tools, often to deal with the legacies of civil war and state fragility.

The use of law, or legal politics, changed during three historical phases. The first, the colonial era, stretches from 1898 until 1956. During this period, the British colonial authority developed a cadre of Sudanese lawyers, educated in Britain and following British law and legal practice, to maintain stability and control of the population. The second period is that of Sudanese independence, which runs from 1956 to the onset of Omar Hassan Al Bashir's rule in 1989. In the third period, lasting from 1989 until 2011, Bashir developed a relatively stable legal order based on Islamic law, building up the legal system and training many new lawyers. During this third period, a variety of international organizations and nonstate actors sought to promote legal development, human rights, and the rule of law. In each period, struggles over which law system was to prevail were fundamental to creating

the nation. In the postindependence struggle over whether Sudan was to be part of Egypt or independent, which law it would adopt was a central issue. Subsequent nation-building efforts turned to Islamic law and the use of *hudud* punishments to buttress an Islamic national identity. Thus, the law served to define the nation.

Massoud's study underscores the importance of the nature of the legal system for defining the nation. Indeed, the postcolonial efforts to create unitary legal systems out of the patchwork of colonial law, customary law, and international law show the importance of law to projects of nation creation and nation building. Such strategies also enhance the legitimacy of a new country in the eyes of other countries. Since the ultimate guarantee of sovereignty is recognition of that sovereignty by powerful countries, creating a country with a unified legal system is an important step. For example, my research on law and colonialism in nineteenth-century Hawai'i (Merry 2000) showed how elites, both Hawaiian and foreigners, sought to create a rule-of-law system that would signal the creation of a sovereign state and discourage colonial takeovers. By the 1840s, Hawai'i had a declaration of rights, a constitution, and a body of laws. Indeed, the strategy of retaining sovereignty through creating the rule of law was fairly successful until the 1890s when the United States, in conjunction with US residents of the islands, engineered a political takeover and, in 1898, annexed the country. Thus, the creation of the rule of law protected Hawaiian sovereignty in the short run, but could not stand up to the imperialist demands for a coaling station and the expansion of US power in the Pacific in the late nineteenth century.

The situation in Sudan took a different path from that of Hawai'i, but in its own way shows the strategic advantage of adhering to a rule-of-law model. In the Sudan, establishing the rule of law facilitated the claim to sovereign status and discouraged external intervention, but it also built legitimacy for authoritarian rule and failed to produce either democracy or peace. In many ways, Massoud's book could be called "The Tragedy of the Rule of Law in Sudan." It challenges both the idea that Sudan had no law, and that the rule of law produced justice and democracy. Instead, it shows how law operates in a fragile state during both its colonial and postcolonial periods. During the colonial period, the rule of law was used to legitimate the colonial regime, even in the face of political chaos. Like other colonial powers, the British were reluctant to expend scarce resources on administrative costs such as courts and legal services. During the postcolonial era of authoritarian rule, which runs from independence through the present, rule-of-law claims were again deployed to legitimate the state, increasingly building on the preexisting commitments to Islam and Islamic law. Massoud provides a fascinating account of how Bashir seized and consolidated power after 1989 by targeting law, bringing it under his control by vastly expanding the number of lawyers and training them in Arabic in a regime-approved version of Islamic law rather than in English and in the common law. Thus, Bashir tamed the law so that it was not opposed to the state but a part of it. At the same time, he expanded its capacity to control ordinary people through the proliferation of lawyers and courts, especially criminal courts.

The international human rights system has also not succeeded in undermining this authoritarian legal regime. International humanitarian and human rights organizations brought ideas of human rights to Sudan at the same time as development

agencies adopted rights-based development. Yet Massoud casts doubt on the effect of this mobilization of human rights and the dominant paradigm of rights-based development. He argues that authoritarian governments can use the rights framework to support groups sympathetic to them and to restrain others, thus producing deeper splits in civil society (2013, 17). Even though human rights–based strategies promise to benefit the poor, Massoud shows that they fail to do so if the poor lack the resources and skills to exercise those rights; rights are meaningless unless they are enforced. He concludes that the effect of human rights training in this war-torn, fragile, authoritarian state is quite limited. It may encourage some people to turn to the state, while for others, it is irrelevant. This observation is worth pondering since the promotion of human rights is an important dimension of promoting the rule of law. Nonetheless, the British colonial experience in the Sudan does have implications for the human rights project. The British invested in training lawyers, building legal institutions, and connecting these institutions and lawyers into a global British colonial network. To some extent, they succeeded in producing an educated legal elite. If human rights are to take hold as did British law, their advocates might need to follow a similar path.

Massoud takes a somewhat Marxist view of law as a system closely linked to power, but mixes this perspective with legal realism and sociolegal theory. He examines how law works in practice: how it is used, by whom, and with what effects. Law is a tool available to those who can use it but it also has an emancipatory potential, a "tool simultaneously of political oppression and redemption" (2013, 88). He observes that "[i]n unstable political contexts, legal solutions are instruments of both oppression and liberation" (2013, 17). His understanding of law as a political resource parallels the way I see the power of quantification and indicators: both are technologies that have the capacity to empower those able to harness them (Merry 2016). Of course, it is experts with skills, resources, and political power who are best positioned to harness both the law and the production of quantitative knowledge. However, the less powerful still have the potential to harness these tools.

Massoud focuses on the use of law to maintain power, whether British colonial power or that of an authoritarian state. It is a form of politics rather than a system outside of politics. "At root, law cannot be separated from the political practices that shape it" (2013, 15). Yet, law is never just an instrument, a tool available to political elites to use as they wish. It has its own rules, actors, and practices, along with the need to maintain some semblance of justice if it is to appear legitimate. As E.P. Thompson argued, law must maintain some sense of justice and fairness in order to retain its legitimacy (1975). Law is open to manipulation, but within limits. Where these limits are and when the features of the legal system itself obstruct its mobilization for political purposes is the most interesting aspect of the way law exercises power.

Massoud recognizes this complexity of law. He sees it not simply as a mode of power but also as a system with some constraints and internal checks that open possibilities for use by the less powerful. However, given the historical sweep of the project, he is not able to explore the limits of legal politics at particular moments or to identify specific conditions when the appropriation of law by political elites

fails or is obstructed. Such an analysis would examine particular moments of legal appropriation to see where they succeeded and where they failed. It would focus more on litigants, lawyers, and judges than on the relationship between political elites and law. Massoud has admirably laid the groundwork for such a further exploration; it would be fruitful to follow this path further.

Another issue Massoud raises that is worthy of further inquiry is the effect of legal pluralism on legal politics. One of the fascinating dimensions of the legal composition of Sudan is its radical legal pluralism: its complex layering of local, British, Islamic, and Turko-Egyptian law. This complex layering includes many communities governed by their own rules and chiefs, far removed from the state. One of the most famous anthropological studies of the law, *The Nuer*, carried out by E. E. Evans-Pritchard during the 1930s, begins by saying that the Nuer herders have no law, then takes 260 pages to describe their rules and procedures for settling conflicts, paying compensation for homicide, deciding whether or not to instigate a blood feud, arranging marriages, determining cattle ownership, and a myriad of other social situations (1940). The Nuer, now living in South Sudan, certainly had both law and law-like institutions for settling conflicts. Such indigenous legal systems are widespread throughout the country, alongside the other legal regimes mentioned above.

Another possible expansion of this work would be to include ordinary people. This is now a study of legal and political elites, largely situated in Khartoum. It includes an analysis of documents, of the organization of the bar in Sudan, and of relevant laws and legal decisions, but it does not say much about the views of the common people, what they think about the law or human rights, or to what extent they are persuaded about the legitimacy of the state or impressed by its adherence to legal forms. The core concern is with the political actors at the center, not the powerless people on the periphery. It would be valuable to ask about the legal consciousness of the poor, villagers, farmers, and nomadic peoples who live under quite different legal systems outside the elite world of Khartoum.

Uncovering the perspective of common people could also illuminate their stance toward human rights. In the Sudan, Massoud thinks that teaching people about human rights does not necessarily lead to challenges to the state. However, the impotence of human rights here may depend on the authoritarian state and its failure to respond to rights claims as well as the inadequacy of the training programs. For example, Harri Englund's study of human rights training in Malawi (2006) also finds impotency, noting the inadequacy of the training itself, its lack of attention to local meanings and languages, and its failure to tackle everyday injustices or to destabilize authoritarian rule in the country. In my research in a small town in the United States, I similarly found that telling battered women that they have rights, in the absence of an effective legal response to their claims, has little effect (Merry 2003). Human rights cannot be simply an idea; they must also offer an effective strategy for individuals who claim them.

Thus, Massoud's book offers important insights about the interaction between legal and political elites and the rule of law's capacity to challenge authoritarian governments, but it says relatively little about ordinary citizens. It does not explore their legal consciousness, their mobilization of law, and their sense of state

legitimacy. These are, however, important questions that a subsequent study might address. It would be interesting to get a greater sense of how effective the authoritarian state has been in constructing legitimacy through law, for example, and how these views vary among the highly diverse social communities that make up Sudan. The book focuses on Khartoum and politics, not on groups such as the Nuer, the Dinka, or the Fur. When Evans-Pritchard studied the Nuer, he found that they viewed the state as very remote and its laws irrelevant to everyday life. Communities were governed by rules, local chiefs, and the fear of curses and blood feuds. Massoud has introduced us to the world of the political and legal elites and their use of rule-of-law conceptions and institutions. Now it would be fascinating to take this question to the countryside and the urban slums to see if here the rule of law confers legitimacy on the authoritarian state and if ideas of rights are absent or irrelevant to ordinary people. Massoud has given us a fascinating account and at the same time opened up new questions to pursue.

In sum, Massoud's book provides a valuable perspective on the limits to the rule of law, showing that it can be co-opted and used for nondemocratic purposes. Perhaps we expect too much from the rule of law. As Massoud shows, it clearly serves to maintain order and the legitimacy of the state. Do we also expect it to challenge the power of the state? The rule of law can mean simply a set of procedures rather than a mechanism to produce substantive justice. Indeed, in the context of neoliberalism, this is increasingly what the rule of law means. *Law's Fragile State* invites us to interrogate further exactly what we mean by the rule of law and what we expect it to accomplish. It reminds us, as sociolegal scholars, that law is always embedded in larger political structures and leads us to ask where its autonomy lies and what kinds of constraints it faces. And its historical perspective makes clear that legal systems may be built up over time from experience, conquest, and multiple religions and national legal traditions. A rule-of-law system introduced from another sociocultural framework will inevitably be only one more competing legal order.

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Rethinking Law and State Building in Sub-Saharan Africa

Rachel Ellett

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

LEGAL POLITICS IN AUTHORITARIAN STATES: SOME REGIONAL PERSPECTIVE

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

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

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

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

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

CONTEXTUALIZING COURTS THROUGH THE LEGAL COMPLEX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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The Rule of Law between England and Sudan: Hay, Thompson, and Massoud

Martin Krygier

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

Two significant writings, one by Douglas Hay and the other by E. P. Thompson, appeared in 1976. Both sought to explain relationships between law and social (specifically, ruling-class) power in a manner that avoided treating law either simply as a coercive instrument of class domination ("vulgar Marxism"), or as a good for all ("liberal legalism"). They overlapped and each was influenced by the other, but they differed significantly, in substance, in tone, and in admirers. Mark Massoud sensibly and thoughtfully draws inspiration from both. This article queries, however, whether his account of the role and rule of law in Sudan manages to resolve a significant tension between Hay and Thompson. This results in a certain ambivalence in the telling, a sometimes anguished oscillation between two interpretive modes, perhaps sensibilities, represented by Hay and Thompson, each of which can lead in different directions.

I

It is rare for specialized historical investigations to resonate far beyond their primary discipline, still less to entrance (and enrage) readers quite innocent of the period discussed. Precisely forty years ago, however, this occurred to two essays from a common, collaborative, project: "Property, Authority and the Criminal Law," by Douglas Hay (Hay 1975); and the concluding section of the concluding chapter of *Whigs and Hunters. The Origins of the Black Act*, by Hay's mentor, E. P. Thompson (Thompson 1975).

Both attracted hordes of critics and admirers, though not always the same ones. Hay was harshly criticized by some as too Marxist (Langbein 1983); Thompson as not Marxist enough (Collins 1982, 144). That, given Thompson's long eminence among British Marxists, implied that he was not merely a miscreant nor even a heretic but an apostate (Merritt 1980, 210: "The nub seems to be that Thompson is not a Marxist historian").

Both Hay and Thompson spoke to a widespread concern of the time, particularly on the academic Left: how to explain relationships between law and social (specifically, "ruling-class") power in a manner that avoided treating law either

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simply as a coercive instrument of class domination ("vulgar Marxism"), or as a good for all (a view often attributed to "liberal legalism"). Since these questions can arise outside England, and beyond the eighteenth century, Hay's and Thompson's ways of answering them could travel far and last long, as models for some, antimodels for others; and so they have. And while Marxist historical explanation is less fashionable now than once (no bad thing in my view: Krygier 1990a,b), these remain exemplary works of rare force, imagination, and insight.

Hay's specific concern was to explain the coincidence of "one of the great facts of the eighteenth century" (Hay 1975, 18)—the "flood" of capital offenses that engulfed England with unprecedented speed—with the relatively small number of executions compared to earlier centuries with fewer such penalties, and at a rate that did not rise, throughout the century. While many complained of a failure in the criminal law, Hay saw this apparent mismatch of law and enforcement as an ingenious success, its discordant parts fitting together like hand in glove.

Hay put this apparent paradox of increasingly harsh laws but frequently lenient implementation down to a sophisticated choreography of "terror," "majesty," "justice," and "mercy." Terror, effected, *inter alia*, by the increase of capital crimes, formed the ever-present backdrop, but could not be used routinely, if only (though not only) because England did not have a professional police force.

In such circumstances, more subtle ideological means of invoking awe, deference, gratitude, and obedience served. "[T]error alone could never have accomplished those ends" (Hay, 1975, 25). Indeed with its much embroidered majesty, exemplary pardons, and parades of fairness, law was well constituted to legitimate domination in a way that pure resort to brutal force would not have been. Hay concedes that this parade of ideological appearances was not always empty—"eighteenth century 'justice' was not … a nonsense" (Hay 1975, 39)—indeed, could not be; that was a source of its ideological charm. But that had no independent significance for him. What mattered was its contribution to "allow[ing] the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinacy" (Hay 1975, 48). In his telling, apparently ill-fitting elements of the legal order came to form an elaborate kind of integrated mosaic—the way "a ruling class organizes its power in the state"—its bits and pieces gelling into coherent patterns of purpose and effect. The apparent incoherencies of the criminal law were the very elements—all over the place in detail, all falling into place in function—that conspired to legitimize force in "a society with a bloody penal code, an astute ruling class who manipulated it to their advantage, and a people schooled in the lessons of Justice, Terror and Mercy" (Hay, 1975, 62–63).

Whigs and Hunters was a close reconstruction, from masses of fragmentary evidence, of the origins and social meaning of the Black Act of 1723. "Black" referred to camouflage used by poachers on the job, and the Act "at a blow" created around fifty new capital offenses, to do mainly with deer poaching from forests owned by the propertied. It provided, Thompson writes, "a versatile armory of death apt to the repression of various forms of social disturbance" (Thompson 1975, 191–92), and was the model for the legislation that was to follow, with which Hay was concerned.

As one of the most distinguished Marxist historians of his generation, Thompson did not need to be told that this and other laws might be of use to ruling classes, and

indeed he emphasizes that new propertied wealth was the source of this armory. In a conflict between "users" and "exploiters," "petty predators" and "great predators," the Act was crafted and employed, he argues, by the latter, "men who had developed habits of mental distance and moral levity towards human life, or more particularly towards the lives of the 'loose and disorderly sort of people'" (Thompson 1975, 196).

Had Thompson stopped there (which, given that the offending section starts at page 258 of 269, he almost did), it is unlikely fierce controversy would have erupted. But to the dismay of erstwhile comrades, he made bold to conclude and, more, to find confirmation in his bleak story, that while:

> We ought to expose the shams and inequities which may be concealed beneath the law . . . the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me an unqualified human good. (Thompson 1975, 266)

In a swingeing polemic against monochrome reduction of law to the interest of ruling classes, Thompson's eleven pages elaborate the claim that the "*rule of law*," notwithstanding that it included the law he had excoriated in the rest of the book, was a "cultural achievement of universal significance." Not all who had learned from him over the years were happy with this conclusion, least of all coming from *him*. Friedrich Hayek (see, e.g., Hayek 1960) could be left alone to say such things: Who in the early 1970s, and on the Left, cared about him? But E. P. Thompson!

At several levels, including those of description and explanation, there is not a huge distance between Hay and Thompson. Each was indebted to the other, and to Marx, each believed that the law served the interests of a ruling class, and that central to this accomplishment were the ideological uses of law. Yet the differences are more significant than might appear.

Hay's article is a literary and intellectual *tour de force*, but his *style* of account can easily generate a kind of closed circle of interpretation and argument that allows nothing to evade its explanatory reach and threatens to flatten all before it. Whatever happens is grist to the explanatory mill. Thus, if a regime brutally oppresses the poor, that is how the ruling class dominates them. If it does not—listens to lawyers' arguments, issues pardons, respects judicial independence, and so on—then it is doing the same job but in a more clever if roundabout way. Thompson's account has the same culprits using many of the same methods, but they do not call all the shots, and not everything can be reduced to their interests. Moreover, to use an expression of Arthur Lovejoy's (Lovejoy [1936] 1964, 10–14), the "metaphysical pathos"—the mood, tone, sentiment, emotional coloring—evoked by the two pieces differs radically. So, too, the extent that ambiguity and complexity survive their explorations, and also the normative implications to be gleaned from them—particularly implications about "the rule of law" and its value.

II

In recent decades, the rule of law has become hugely fashionable around the world, in a way and to an extent that no one could have predicted in 1975 (see

Krygier 2014). International development agencies would be lost for words without it. From Afghanistan to Zambia, billions of dollars are spent on it. Thousands of intelligent, committed, often brave people are devoted to it. But the results have not been especially happy.

Why? Well, for one thing, it is not easy. *You* try instituting useful and sustained changes, likely to hit powerful interests, in societies presently or recently wracked and rocked by despots, war, poverty, pestilence, ethnic and religious divisions, and often perennially weak institutions. Or sometimes strong institutions but not the ones you want. And not everyone wants what you want; this is a lesson that often takes a lot of learning. Sometimes, it is far from clear whether anyone *should* want what you want; learning that can also take time. There is also the distance between what you want and what you know how to do. It should not therefore come as a shock (though often it has) that "we know how to do a lot of things, but deep down we don't really know what we are doing" (Carothers 2005, 15).

We can learn a great deal about "what we are doing" if, inevitably, less about what we should do, from *Law's Fragile State* (Massoud 2013), a book exemplary in many ways—as history, ethnography, normative and explanatory theory. Others who have not learned from this book all they know about Sudan can comment on its ethnography and history. I will stick to theory. But that is more than enough, for Massoud wrestles with, indeed agonizes over, general normative and theoretical conclusions to be drawn from his exploration of "what law does, and what it fails to do, in [one of] the world's most desperate environments" (Massoud 2013, xv). Those conclusions include the following.

First, and contrary to widespread assumption, a state like Sudan—"failed," fragile, war-torn and authoritarian though it is—is not lawless. On the contrary, law "is, in fact, everywhere one turns" (Massoud 2013, 26); it "matters hugely in a nation as fragile as Sudan" (Massoud 2013, 5). Sudan's longest-serving and current dictator/president, Bashir, "made the largest investment in courts and legal infrastructure that the nation had ever seen" (Massoud 2013, 213). This was not by accident or absent-mindedness, but by design. Law is helpful to him. More generally, law is a key part of the armory of all the elites Massoud treats: colonial and local rulers, and nonstate actors, local and international.

Second, "the practice of promoting law—and ultimately the law itself—must be understood primarily as a social and political process" (Massoud 2013, 212), not just a technical one. Whoever wields it, law is a weapon in legal politics and enmeshed in local social practices. Unless one understands those politics and practices, and how law interacts with them, one will fail to understand its role and significance. It is malleable, and so too are its normative implications.

Third, law and legal politics are profuse in unintended consequences, especially it seems for would-be good guys. Human rights and civil society activists who seek to enlist and reform the law in the service of the poor have so far failed to do much of that, but have on occasion helped to legitimize the power of the dictatorship, "already accustomed to using any available legal tools and resources for political gain" (Massoud 2013, 206).

Fourth, and perhaps a reason for their disappointments, reformers, particularly internationals, often do not know much about what they seek to reform. They

apply general templates drawn from elsewhere and find it difficult, even if they try, to acquaint themselves with local realities, among them legal realities. One result is that while reform efforts might have important and positive side-effects for the elites who promote them, it is less clear that they do much to better the conditions of the poor and displaced millions in Sudan for whom they are ostensibly intended. This might mean not only that they fail to help those most in need, but also that they can prove self-subverting. For in contexts where dictators find law so useful, "the activities of legal politics that constitute a program to promote the rule of law—training judges, police and prison wardens to abide by human rights and educating survivors of war to demand those rights—are inseparable from activities that also strengthen law in a given country. While the two concepts are analytically distinct, it has practically proved challenging if not impossible to build the *rule* of law without building the *law* itself" (Massoud 2013, 215).

For someone with a soft spot for the rule of law, this is not a happy story, but it is highly persuasive: insightful, disturbing, and, more than once, moving. In particular, Massoud's insistence on law's inextricable social and political embeddedness, his examples and critique of reform-by-template, his stress on the pluripotency, multifunctionality, indeed rampant *promiscuity* of law, all ring true. Rule-of-law promoters are often disarmed by such facts. Sudanese dictators, by contrast, appear well aware of them.

No one who has read Hay and Thompson would be surprised by these findings, though they would certainly be enlightened by Massoud's account of them. If one is interested to draw general implications from this account, however, what would they be? Here I think the book points in several directions, and the answer is not altogether clear.

It can be hard to sustain a coherent overall interpretation of the huge and long surfeit of manmade disasters that Massoud has witnessed and described, and it may not be wise to try. His book is remarkable for the extent to which it illuminates as much as it does. However, the strain sometimes shows, in at least two ways. First, in a tendency to reify and homogenize "law," where more disaggregation would have been useful: less gathering of many different policies, practices, forms, aims, and ideals under one short noun; more exploration of adjectival forms. Second, in a certain ambivalence in the telling, a not completely resolved reliance on two interpretive modes, perhaps sensibilities, that compete for his own, though their implications can differ. Let us call one sensibility Douglas; the other Edward. E. P. for short.

First, reification. Massoud writes that "law can serve tyranny and violence as easily as it can serve liberty and peacebuilding" (Massoud 2013,10), and "[l]egal resources are just as likely to strengthen a dictatorship as they are to embolden people to overthrow it" (Massoud 2013, 12). Again, he argues that "[d]espite conscious political and rhetorical efforts to distinguish themselves from the colonial past, postcolonial governments in Sudan have been strikingly similar to one another and to the colonial administration" (Massoud 2013, 211–12). Elsewhere, "more than simply sharing the same space, the judiciary under Bashir has been dedicated to the same repressive goals as Sudan's former colonial masters" (Massoud 2013, 119).

Yet, of the period between 1956 and 1989, we learn that "[i]n many ways, Sudan's legal order was as abused and traumatized by these postcolonial political machinations as its people were" (Massoud 2013, 118). One chapter is devoted to the successful efforts of President Bashir, who seized power in 1989, to emasculate the legal profession, academy, and judiciary. He "turned the law into a servant of his political agenda to an extent unmatched by any of Sudan's previous governors" (Massoud 2013, 119). He conducted a "full frontal assault against the legal profession" (Massoud, 2013, 121), "altered the system of legal education to undermine the prestige of the legal profession" (Massoud, 2013, 131), and engaged in a comprehensive and successful campaign to "limit the ability of judges to pose a threat to his regime" (Massoud 2013, 131). These were deliberately imposed *differences* in aims, values, and practices between the colonial and immediate postcolonial regimes, on the one hand, and the dictatorships that followed, on the other. One learns of them all from Massoud's book, but it might have been useful to explore a bit more the implications of such differences and why they were imposed.

For, and second, these differences relate directly to the value of the *rule of law*, which, as Massoud's whole book and particularly his last pages show, concerns him deeply. Though the phrase is invoked for too many purposes these days, a central and fairly uncontroversial element in the ideal involves hostility to the arbitrary exercise of power. More might be involved, but that is key.

Not everyone is, equally or indeed at all, hostile to arbitrariness. At home the British legal tradition, more than many, embodied such a concern (see Reid 2004). Of course, it was often honored in the breach, and it is always fundamentally compromised in colonial settings, if only because it demands that persons be treated without arbitrary discriminations, and that is one thing colonists do not do (see Krygier 2005). And yet, recall Thompson:

> In a context of gross class inequalities, the equity of the law must always be in some part sham. Transplanted as it was to even more inequitable contexts, this law could even become the instrument of imperialism. For this law has found its way to a good many parts of the globe. But even here the rules and the rhetoric have imposed some inhibitions on the ruling power. If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters. (Thompson 1975, 266)

In similar vein, Massoud writes frequently of the attractions and uses of English law to anti- and immediate postcolonial activists, and with his typical fair-mindedness he notes more generally:

> Certainly, being encouraged to count on the rule of law was an important aspect of the Sudanese colonial experience .... The provision of the rule of law was imperfect during Sudan's colonial period, but it was strong enough to be taken seriously (and later adopted wholesale) by *effendiyya* (elites and intellectuals) and major political and religious figures. (Massoud 2013, 45)

He never suggests that Nimeiri or Bashir share the value. As he says, they ruled by law, among other things; but on his account, constraint was far from their minds. Massoud defines rule by law (by contrast with rule *of* law) as "a structure of governance in which law exists at the service of government officials, rather than as a force that constrains state behavior" (Massoud 2013, 21). That captures what we learn from him about the dictators, but we hear a more complicated story about the colonizers. They appear to have been committed both to service and constraint, however uneasy, tension-ridden, and hypocritical that combination necessarily was. Just to say they all found "law" useful is not to say enough.

And indeed that is not the whole of Massoud's story. He agonizes about good possibilities that law, and in particular the rule of law, might yet serve, and in fact at times did serve, and worries aloud about Thompson's claim that the latter is an "unqualified human good." Thus, while Douglas-Massoud tends to homogenize the uses of law by all the regimes of which he writes, as in several of the passages quoted above, Massoud is different. Though he has no time for the colonial government, he finds complexity in its use of law and in the consequences of that use. Indeed, at one point he notes that "[w]hile [Thompson's] study concluded that law existed ... as an ideology to serve and to legitimize power tightly controlled by elites, he also demonstrated that law served to constrain those powers. My findings about colonial law in Sudan come to a similar conclusion" (Massoud 2013, 224). It does not always sound similar, however.

But sometimes it does. Thus, "[t]he perception that the [colonial] judiciary was independent was not illusory and has remained among many lawyers in Sudan" (Massoud 2013, 64). In cadences worthy of Thompson, Massoud reports: "[l]ike all foreign diplomats, members of the Sudan Political Service were appointed to serve the interests of the metropole. But unlike many of their colleagues stationed in other British colonies, many SPS officials saw themselves as obligated to serve the Sudanese as well. They sought to promote an authority in Sudan greater than their own: the authority of law ... the rule of law was not just lipstick on the face of an authoritarian pig. On some level, however limited it was, norms of fairness did guide Britain's representatives in Sudan." What E. P. gives with one hand, however, Douglas immediately withdraws with the other: "But by cultivating an image of fairness and justice, the colonial regime was also able to maintain its essentially unjust and authoritarian rule" (Massoud 2013, 82).

There is no logical inconsistency between the two Massouds. Law can ultimately serve bad purposes even if it does some good; indeed, as Massoud—like Hay and Thompson—stresses, doing good can be one way of doing bad because it legitimizes power, distances it from (its own) distasteful acts, can act as a pressure release valve. But sometimes, even in the midst of bad, doing good just does good; sometimes it is even intended to. We should leave conceptual space for those possibilities. E. P. is more open to them than Douglas.

Though Massoud is drawn both to Hay and Thompson, then, he does not quite resolve the tension between them and, indeed, I suspect, within himself. He is torn. I would hope that the sometimes Procrustean allure (and real power) of Hay-style unmasking not blind him to bits that do not fit, to often tension-filled complexities and ambiguities, more evident in some legal orders than others, and to the potential

richness of accounts that strive to accommodate them. Still less blind him to the value that Thompson, who recognized such complexities and ambiguities, deems precious.

III

But what of the failures and pathologies of rule-of-law promotion that Massoud so perceptively and convincingly documents? Do they not show that Thompson and others who value the rule of law should just get real, since it does not serve the goals they pretend to honor? Not quite.

Recall Thompson again. First, note where he starts: with a valued achievement, not a bunch of hallowed official institutions. Perhaps fortunately, Thompson was not a lawyer or a rule-of-law promoter. Unlike most who write about or seek to promote the rule of law today, he did not identify it with any particular checklist, recipe book, or template of legal and institutional hardware. Rather, he began with the "obvious point" that "there is a difference between arbitrary power and the rule of law," the latter identified by a valued achievement—"the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims." It was only to the extent such "inhibitions" existed that so did the rule of law. This order of proceeding is not the same as, and makes a lot more sense than, beginning with some particular box of legal tricks and identifying it as the rule of law (see Krygier 2011), wherever it happens to be planted or transplanted.

Second, where did Thompson look for evidence of the existence of the rule of law? Again, not in particular legal forms and institutions, which, he noted, were constantly being "created . . . and bent' by a Whig oligarchy . . . in order to legitimize its own property and status" (Thompson, 1975, 260). Still, that oligarchy could not do as it wished; its hands were often tied by the law it sought to exploit. How did Thompson show this? He called in aid facts such as that "[w]hat was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights . . . law was a definition of actual agrarian *practice*, as it has been pursued 'time out of mind' . . . 'law' was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law. And . . . this law, as definition or as rules (imperfectly enforceable through institutional forms) was endorsed by norms, tenaciously transmitted through the community" (Thompson, 1975, 261).

Thompson was right to begin where he did—with a valued end rather than some contingent set of legal means—and he was also right to seek his evidence where he did, in social facts rather than merely in official institutional artifacts. In doing so, he confirms Massoud's observation that "accounts that separate institutions from actors succeed in telling only half the story of the politics of law . . . . Courts are one visible manifestation of the legal order, but other indicators include basic legal awareness and street-level empowerment of the poor" (Massoud 2013, 31). By contrast, many reformers think they are building the rule of law, or bringing it to benighted countries whose deepest problems might have little to do with any particular list of legal *bric-à-brac* for export and installation, but more, as Massoud

stresses, with social and political realities of which lawyers are often typically ignorant.

It may just be that we do not have a clue how, deliberately and quickly and in dire circumstances, to move toward the value Thompson attributed to the rule of law. Perhaps we should just settle for the advice of the Irishman who asked for directions to Dublin: "I wouldn't be starting from here." But we should not easily give up on the ideal, even in face of the many follies of those who imagine they are "building" it. It should always stand as both a *critical* principle by which to evaluate their/our efforts, and, more hopefully, as one among the regulative ideals for which they/we should aim.

Those who would "promote" the rule of law should not imagine that they can easily cook it up from the legalistic recipes so widespread these days. These, as Massoud has so powerfully shown, often produce tasteless meals, and not always for those who most need a feed. But nor, again, should they quickly discard, as a good in itself, the ideal of reducing arbitrariness in the exercise of power. This remains a "cultural achievement of universal significance," as complex, valuable, variably and variously approached as it is difficult to attain. The last pages of *Law's Fragile State*, full of anguished acknowledgment of ambivalence and complexity, suggest Massoud might agree.

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Ideals and Practices in the Rule of Law: An Essay on Legal Politics

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

This essay responds to the three commentators in the symposium on my book, Law's Fragile State, *by describing the sociolegal study of the rule of law as an investigation into both a set of ideals (the rule of law as a normative question) and a set of practices (the rule of law as an empirical question). Studying the rule of law involves understanding the contingent nature of its ideals as well as investigating the actual work that lawyers, judges, state officials, aid workers, activists, and others have done in specific contexts to promote legal remedies to social or political ills. These overlapping layers of the study of the rule of law—ideals and practices, normative and empirical—provide a sociolegal framework for understanding the successes and failures of legal work and, ultimately, how citizens experience state power in democratic and nondemocratic societies alike.*

> If law is the master of the government and the government is its slave, then [our] situation is full of promise and [we] enjoy all the blessings that the gods shower on a state.
>
> Plato (2000)

INTRODUCTION

I am grateful for and have learned from Rachel Ellett's studies of comparative judicial politics, Martin Krygier's philosophy of ideals in the law, and Sally Engle Merry's ethnographic approaches to international law. I am also humbled by their careful and critical engagement with *Law's Fragile State* (Massoud 2013) and for

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pushing me beyond that book to account for practices associated with the rule-of-law ideal.

This essay responds to these commentators by taking up Krygier's normative provocations and Ellett's and Merry's calls for continued empirical study of courts and the rule of law. Interpreted collectively, their reflections induce in me a desire to describe, as a preliminary matter, the sociolegal study of the rule of law as an investigation into both a set of ideals (a *normative* rule-of-law inquiry) and a set of practices (an *empirical* rule-of-law inquiry). In so doing I illuminate my unease since the publication of my book—a discomfort that Ellett, Krygier, and Merry seem to share—with contemporary practices associated with the rule-of-law ideal (see also Kleinfeld 2012). In this way, ideals in the world matter insofar as they also are grounded in the stories of local institutions and persons promoting or challenging these ideals (Selznick 2008).

THE GENESIS OF *LAW'S FRAGILE STATE*: STUDYING LEGAL POLITICS IN FRAGILE STATES

Merry (2016) and Ellett (2016) discuss the need for sociolegal scholars to understand how people, including political elites with resources and skills, put the law to use. It is through such an investigation in a fragile and conflict-affected state like Sudan that led me to question the moral foundations of the rule of law. That is, living and working in Sudan taught me to see the ideal of the rule of law through an empirically grounded lens, by rooting the rule of law in a specific history, context, and set of practices. My archival research on colonial Sudan and ethnographic observations in contemporary Sudan revealed to me that law's morality may not be inherent and nor should it be taken for granted (see, e.g., Lev 1993; Nietzsche 2007). Rather, any morality associated with the law (and the rule of law) depends on the goals of the actor—whether a lawyer, judge, state official, aid worker, or human rights activist—who uses legal tools to achieve political, social, or economic goals (Massoud 2013, 214-15).

As a graduate student in the early 2000s, I came into contact with a decades-long debate in law and society over whether legal strategies can generate social change (Galanter 1974; Chayes 1976; Glendon 1991; Williams 1991; Feeley 1992; McCann 1994; Epp 1998; Ewick and Silbey 1998; Rosenberg 2008). Sociolegal scholars generally agreed that, under the right conditions, legal institutions, litigation, and rights discourse may be powerful agents of change. Constraints must be overcome but, on balance, the language of rights benefits ethnic minorities and other marginalized persons who are able to access legal resources (Williams 1991). Litigating a dispute, even unsuccessfully, can also be a symbol powerful enough to convince citizens to join social movements (McCann 1994).

While these findings advanced knowledge of law and social change in Western democracies, particularly the United States, I was exposed to little scholarship on rights discourse in non-Western societies (see, e.g., Englund 2004, 2006; Merry 2006), and none on the power of rights for political or ethnic minorities in countries continually torn apart by cycles of political violence. To address this gap, I

traveled to Sudan in 2005 to begin my fieldwork. At the time, Sudan was labeled as one of the world's most "failed states" (Foreign Policy 2016). An historic peace accord was being finalized between the government in Khartoum and a southern Sudanese militia, signaling the end of Africa's longest civil war (lasting nearly a quarter-century from 1983 until 2005), in which more than 2 million people had died. (Many Sudanese had also fled the country, including my parents, who brought me as a boy to the United States.). But Khartoum's political progress in the mid-2000s came alongside bloodshed and tragedy in the Darfur region of western Sudan—mass killings that observers labeled the first genocide of the twenty-first century (see Hagan and Rymond-Richmond 2008; Medani 2011; Fluehr-Lobban 2012; Kaiser and Hagan 2015; Savelsberg 2015).

What can this harrowing political history, then—and Sudan's legal institutions and actors, their successes and failures—offer to a vast literature in primarily US law and society? To answer this question, I surveyed more than 100 years of Sudan's legal development—from the toils of early colonial and postcolonial state officials (many of whom trained as lawyers) to the struggles of contemporary lawyers, aid workers, and human rights activists.

As Ellett, Merry, and Krygier have discussed, in Sudan over the last century, colonial officials, authoritarian leaders, opposition groups, foreign aid workers, and Sudanese activists have sought to achieve state stability and their political, economic, or social goals. These disparate actors share a common set of legal tools and practices—constructing courts, drafting constitutions, overhauling the legal system's basis (e.g., from common law to civil law to Islamic law), creating and controlling religion and religious law, and encouraging the adoption of international human rights treaties. They seek out these legal changes to realize their own versions of a thick or thin rule-of-law ideal or, more simply, as an expedient strategy when facing trouble or chaos. Sometimes, the same persons act in different capacities at different points in their legal or political careers, as judges, ministers, or legal activists (Massoud 2013, 85–118). The case of Sudan exposes—often sharply and painfully for Sudanese citizens—how law, legal tools, and legal ideals matter and how they fail to matter in state political development.

DEFINING THE LAW

Krygier and Merry have pushed me to define the law—as the foundation of the rule of law—more clearly. Clarifying this concept of law, and the work that law does, involves treading into a thorny and centuries-long debate.

For instance, for British legal philosopher John Austin, law was whatever command a sovereign would make (Campbell 1885, 94–96). Austin's twentieth-century contemporary, H. L. A. Hart, saw law as a set of primary and secondary rules made by human beings, including a fundamental rule of recognition (Hart 1961). For Hart's contemporary, US legal philosopher Ronald Dworkin, law was a matter, and a challenge, best left to judicial interpretation (Dworkin 1986). Lon Fuller, another contemporary of Hart's, described law as having a distinct "internal morality,"

drawing from natural law and the high-order purposes of "doing justice, settling disputes, maintaining public order, and enhancing prosperity" (Fuller 1964; see also Selznick 1999, 9, as cited in Krygier 2010, 116). In other words, law is not merely "inert matter," it is a "purposeful activity" guiding institutions that have an integrity of their own (Krygier 2010; see also Winston 1999). Continental legal philosopher and legal positivist Hans Kelsen called law, simply, a "specific social means, not an end" (Kelsen 1949, 20; see also Green 2010, 169).

While these authors disagree on the concept of law, they agree that it creates and is an intimate part of "an arena of social struggle" (Blumenthal 2006; as cited in Gordon 2012, 209). This social struggle—and the related philosophical struggle to define law—exists in part because law is often "obscured by a haze of mythology" centered around uncritical enthusiasm for legal solutions, like constitutionalism, to the state's ills (Lev 1993, 139). That is, wherever law is found, so too is conflict found (see, e.g., Tamanaha 2006). As Ellett writes in this symposium, "law is part of the political struggle, not [merely] a rational bureaucratic edifice against political disorder and palace politics" (Ellett 2016, 472). The anthropologist Clifford Geertz similarly embraces the social construction of law, characterizing law as a work of imagination (Geertz 1983; as cited in Munger 2010, 95). The awareness of this intimate relationship between law, conflict, and imagination brings us closer to understanding legal politics—how people use and promote various technologies of law (legal texts, doctrines, arrangements, and resources) to achieve political, social, or economic objectives (Massoud 2013, 24–27).

THE CONTINGENT NATURE OF LEGAL POLITICS AND THE RULE OF LAW

Krygier argues that when robust in its form and function, the rule of law is an ideal incompatible with any arbitrary exercise of state power. He admonishes me to remember this normative good associated with the rule of law, a good in which even the eminent Marxist historian E. P. Thompson believed.

But, taken together, the essays in this symposium reflect an uneasiness and ambivalence about locating law's power and the rule of law's authority. These suspicions may arise from the study of Sudanese and comparative politics. The ambivalence may also come from an awareness that democratic governments do not always behave democratically—by denying human rights or challenging aspects of the rule of law (Merry 2006; Mattei and Nader 2008), or that autocratic governments do not always behave autocratically—by promoting thin conceptions of the rule of law (Meierhenrich 2008). Lawyers and their legal tools help governments traverse the political spectra between democracy and autocracy, peace and violence, and human rights and human wrongs (Abel and Lewis 1996; Dezalay and Garth 2010; Massoud 2012). This reality makes the rule-of-law ideal tricky to place in good governance schemes, in international public policy, or on a scale that measures "good" states versus "bad" states.

The unease in this symposium is hardly new, nor is it even brazen. But it cuts against some cherished beliefs in the rule of law. Building on Plato, Kelsen, and

Hart, the foundations of the rule-of-law ideal—laws and legal institutions themselves—have great instrumental value and no intrinsic, moral, or immanent value (Kelsen 1949; Plato 1960; Hart 1961). Why? Limiting arbitrary power and promoting injustice are not always mutually exclusive acts. That is to say, imperial objectives and ideals may be injected even into the rule-of-law ideal—as British colonial officials did in Sudan and elsewhere (see Massoud 2013, 44–84)—and it is possible to limit the arbitrary exercise of power while promoting injustices against individual persons or groups within the context of rule-of-law institutions like courts and prisons (see, e.g., Cover 1986).

There is a tendency in legal scholarship and practice to venerate the rule of law and to exalt those who fight for it. And why not? Aside from the politically power hungry, few would disagree with the general maxim that state power ought not be arbitrary and collective freedoms and rights ought to be promoted. But, like any ideal, the rule of law is an ideal that appears in context; it is a contingent feature of domestic or international politics (see, e.g., Munger 2015).

This contingent nature of the rule of law is illustrated in an important example from modern Sudanese history. Chief Justice Babiker Awadalla in 1967 resigned from the Sudan Supreme Court after Parliament called an important Court decision against the majority party an "advisory opinion" that it refused to follow (Massoud 2012, 201–02). Awadalla, who began his training as a lower court judge under the British colonial administration, labeled Parliament's refusal to abide by the Supreme Court ruling as an affront to the rule of law, in a widely distributed letter to the people of Sudan (Khalid 1990; see also Massoud 2012). Awadalla's resignation made him a martyr for the rule-of-law ideal and an overnight national political sensation.

Two years later in 1969, however, Awadalla joined a military coup and helped to overthrow the elected government in which he had served as Chief Justice. Four years later, by 1973, Awadalla—by this time appointed Sudan's Vice President by Sudan's military ruler, Jafaar Nimeiri—overhauled the basis of Sudan's legal system from common law to civil law, thus taking a step toward fulfilling the pan-Arab political goals he shared with Egyptian President Nasser to annex Sudan to Egypt, a civil law country (Massoud 2013, 104–10). While the rule-of-law ideal is not unfamiliar to civil law, Awadalla's rapid and political overhaul signaled a critical point in the disintegration of Sudan's burgeoning postcolonial legal system. One hand venerates the rule-of-law ideal and, seizing political opportunity, the other destroys it.

The rule-of-law ideal certainly is a basis for criticizing Awadalla's flip-flopping between support for and demolition of the rule-of-law ideal in Sudan. But his behavior reveals neither that the rule of law is, on the one hand, an excuse for power nor, on the other hand, that it is a good in itself (Thompson 1975). Awadalla's reverses are a reminder of law's alluring power and that the rule-of-law ideal may be only as distinguished as those who fight for it (Silverstein 2009; see also Comaroff and Comaroff 1997). We may learn about the rule-of-law ideal, then, in those admirable moments when political leaders or activists struggle for it as well as in those lamentable moments when those same persons succumb to more tempting desires. The constellation of practices associated with the rule of law, then, may be

as broken, inconsistent, and discordant as each individual person may be (Nouwen 1979; Hernandez 2006).

All this is to reflect, ultimately, on the rule of law as a construct of desire. But thoughts and desires, however clear or compelling to the mind, are not easily imported or neatly fit into reality. The models must be made real by humans who are themselves imperfect, a point emphasized by legal philosophers and legal historians alike (Hay 1975; Thompson 1975; Horwitz 1977; Levinson and Balkin 2011). Krygier notes these difficulties in achieving the rule-of-law ideal in domestic settings when he writes pointedly: "*You* try instituting useful and sustained changes, likely to hit powerful interests, in societies presently or recently wracked and rocked by despots, war, poverty, pestilence, ethnic and religious divisions, and often perennially weak institutions" (Krygier 2016, 483).

STUDYING RULE-OF-LAW PRACTICES

The normative question considered above, of whether and how the rule-of-law is an ideal worth pursuing, begs the social and historical question of how the rule of law has *already* been pursued—the empirical investigation that Ellett and Merry encourage. That is, what does the rule of law look like, and how has it changed, while it is pursued in action rather than merely in thought? And to what extent does promoting legal solutions to social, economic, or political problems ultimately refashion the rule-of-law ideal?

To address these questions, this section offers an alternative reading of the rule of law as an empirical concern of social science and history, rather than the normative enterprise of legal philosophy. To do so, this section explains how the rule of law may be investigated as an empirical matter—focusing on people, places, and the past—and the panoply of findings that may emerge from studying the rule of law through this interdisciplinary, historical, and empirical lens. This endeavor does not abandon hope in the rule of law nor does it set out to contradict the claim that the rule of law is "worth a great deal" (Krygier 2010, 133). Quite the contrary, studying lived experiences privileges people's stories of legal struggle and those data that illuminate the rule-of-law ideal in context. Here, I echo Ellett's "imperative for multidisciplinary, embedded analysis of" legal politics and Merry's admonishment that the rule of law "varies with the political system in which it is embedded" (Ellett 2016, 476; Merry 2016, 465).

Investigating the rule of law as a set of social and legal practices in context allows scholars to understand the political, social, and economic arrangements coextensive with the pursuit of the rule-of-law ideal. It also allows scholars to study, using the tools of history and social science, the people behind the ideal, how institutions matter in their work, and the obstacles they face (Nonet and Selznick [2001] 2001). In other words, a critical and empirical engagement with the rule of law may refine and paradoxically strengthen our attention to the ideal itself.

As Krygier writes in this symposium, the rule of law has brought about a "hugely fashionable" set of international and transnational practices; indeed, "international development agencies would be lost for words without it . . . billions

of dollars are spent on it, [and] thousands of intelligent, committed, often brave people are devoted to it" (Krygier 2016, 483). What are these practices that promote the rule of law? The strategies are designed purposefully, as Ellett suggests, such "that more rules, regulations, legal personnel, and courts will be the magic formula in protecting the free market and building and maintaining the liberal democratic state" (Ellett 2016, 471).

How might one investigate the rule of law as an empirical question, then, to bring us toward the deeper ethnography that Merry solicits and the concentration on institutions like courts that Ellett seeks? As with any empirical study, the approach begins with a research question or problem, often located in a particular context or contexts. These questions are as diverse as human experiences are. Consider, for instance, a few of the concerns that have shaped my own awareness of law's power in diverse political contexts: How do minority-rights activists create social change in places where they are not able to call upon civil rights law (Chua 2014)? Why would an authoritarian regime in Egypt empower its courts with independence (Moustafa 2007)? How do human resource managers construct the experience of antidiscrimination legislation in employment contexts in the United States (Edelman et al. 1996)? Why would a dominant state in China allow impact litigation against polluters (Stern 2013)? How do concepts of human rights take shape in the countries in the Global South struggling with extreme poverty (Englund 2006; Mutua 2008)?

These questions, while not entirely focused on the rule of law, impact our knowledge of ideals by adopting a methodological orientation focused on building social theory and improving law and public policy (Feeley 2010; Gómez 2010; Obasogie 2014). A related approach now being labeled "the new legal realism" may be helpful for future efforts in this arena. This emerging paradigm for the sociolegal study of law emphasizes not legal doctrine or legal text but the "empirical study of people's lived experiences of law, politics, and power" (Massoud 2016, 97; Klug and Merry 2016; Mertz, Macaulay, and Mitchell 2016; see also Moore 1978; Engel 1984; Nader 2002). How, then, might one adopt such a locally embedded approach to the rule of law? It means, to start, investigating law's interactions with people, places, and the past.

Investigate People

Law and legal tools are technologies that people use with a specific purpose. Understanding people means asking the straightforward question when encountering a set of political or social circumstances: Who are the personnel who care about law, and why do they care about it? In Sudan, for instance, a range of key actors across distinct historical periods have proposed legal solutions to the state's ills. These include, most notably, colonial administrators, postcolonial authoritarian state leaders, and international aid activists carrying banners of humanitarianism (Massoud 2011, 2013).

The effects of legal strategies are varied. But the process of understanding who the actors are, how their strategies change over time, whom they purport to assist with the rule-of-law ideal, and why they engage in these programs are important

ethnographic sources of sociolegal scholarship and social policy. Building the rule-of-law ideal, for activists in Sudan and elsewhere, is shaped by daily practices, which may at times be as routine as submitting job applications, signing employment contracts, attending weekly staff meetings, and adding field codes into a spreadsheet (Massoud 2015).

Considering how the rule of law—and rule-of-law promotion—is experienced from the perspective of the most poor is especially valuable. It may reveal how the rule of law augments the power of persons or groups—including lawyers, judges, religious leaders, and foreign aid donors—deemed to be the expositors of the law, and the contests of power between them. Investigating the rule of law from the perspective of the most impoverished or marginalized may also facilitate the study of gaps in the rule of law's reach, and it may reveal both law's ability to coerce and law's *soft* power—its "capacity to reframe political conflict and structure ongoing relationships" (Massoud 2015, 335).

Investigate Places

Human activities, particularly those related to law, depend on and are shaped by a variety of institutional constraints. Here, methods from legal anthropology, legal geography, and comparative politics may be particularly helpful. For instance, a thick description of those legal institutions or of habits that emerge among personnel acting within or upon them may help to trace the boundaries of language in discourses of rights that have become so salient to contemporary formations of the rule of law (Geertz 1973; Schaffer 2006; Kapiszewski, MacLean, and Read 2015).

Understanding place also helps to situate ethnography in context and the "unpredictable turns" that rule-of-law movements take (Munger 2010, 98; see also Ghias 2010; Massoud 2014). As Merry (2016) suggests in this symposium, laying out large-scale or elite political practices and institutional politics associated with the rule of law can carve open space for courtroom ethnography—the study of judges, litigants, and others seeking redress of grievances or legal or social change (see also Feeley 1979; Ewick and Silbey 1998; Scheppele 2004).

Investigate the Past

Studying people and places cannot take place in an historical vacuum. Making an effort to study distinct historical periods—not just the history that shapes the present, but the history that has shaped history—offers sociolegal scholars the opportunity to give attention to the layered processes of state building and activism and their successes and failures (see, e.g., Sharafi 2014). State approaches to the rule of law vary, for instance, by the nature of the state and the electoral and party systems that emerged following decolonization (Ellett 2013) as well as whether a state had been colonized by British forces—as opposed to forces from continental Europe—that encouraged court-centric approaches to the rule of law (Halliday,

Karpik, and Feeley 2012). In addition, legal ideals and practices at one period may be constrained by past decisions, a fear of renewed trauma, or a desire to move out of a period of brutality.

Understanding the past also involves contemplating empire. The rule of law has its own limits and, in practice, every empire (including the rule-of-law empire) engages in behaviors that limit its coercive practices in one way or another (see, e.g., Rana 2010). Thus, examining the rule of law as a descriptive question reveals not just what we hope law to be, but what empires make of the law in practice. Ultimately, investigating people, places, and the past allows writers to document what Krygier in this symposium labels as the "rampant promiscuity of the law," or people's obsessions with using legal tools to achieve their goals (Krygier 2016, 484).

Fighting for law may ultimately help people to cope with life's challenges—soothing democratically elected officials seeking change, autocrats hanging on during times of crisis, and everyday citizens looking for solutions to injustice. To be sure, the empirical study of the rule of law can expose these challenges as much as it can also expose that, "sometimes, even in the midst of bad, doing good just does good" (Krygier 2016, 486). Being open to these paradoxes and to being disenchanted by and critical of our own faith in the rule of law is an important part of strengthening the collective struggle toward justice (McCann 2014).

CONCLUSION: STRENGTHENING AND DISENCHANTING THE RULE OF LAW

As ideals and as practices, the rule of law constitutes the legal field in which sociolegal scholars make sense of law's power, beauty, and terror. I learned over the last decade to see law as an inert tool, neither good nor bad, neither strong nor weak, on its own, and to situate the rule-of-law ideal in specific histories, contexts, and sets of legal practices. My hope is that the reflections in this symposium influence scholars and practitioners to continue to debate the inherent morality of law. In my view, the moral qualities associated with law's power—and the rule of law's claims to authority—in authoritarian regimes, as in democratic countries, reflect the goals (benign or otherwise) of the actor who creates or uses legal tools, strategies, and ideals. Ultimately, this endeavor may involve questioning the meaning of the rule of law and how its meaning is embedded. These issues remain actively under development, including, for me, through ongoing research on the power of Islamic law in society (see, e.g., Massoud and Moore 2015).

Just as a principled understanding of the rule of law helps us understand our values, our hopes, and what we would fight for, an empirical investigation into the rule of law helps us understand what challenges we might face when we join that struggle. Both of these—principles and data—are ultimately essential for a richer understanding of the rule of law's power. Studying legal politics among key actors in a place like Sudan over the *longue durée* is as much an attempt to explain the

practice of the rule of law in conflict zones as it is to understand, comparatively, the practice of the rule of law in more stable democratic societies. The rule of law is not perfect in either place, but it is more or less robust. Disenchanting the rule of law in both sets of contexts also strengthens the collective pursuit of justice—itself a messy business, and studying it perhaps even messier.

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