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Seeing Like an Islamic State: *Shari'a* and Political Power in Sudan

Jeffrey Adam Sachs

Islamic law, or *shari'a*, has been incorporated into the legal systems of many states. In much of the existing literature, this process is understood as part of the colonial and postcolonial state's attempt to render law *legible*—that is, codified, standardized, and abstract. In this article, I show how some state actors chose to move in the opposite direction, actively discouraging the transformation of *shari'a* into a formal and codified system of law. Using the case of colonial and postcolonial Sudan, I argue that these actors viewed legal legibility as a threat to state power, recognizing the jurisgenerative potential of an informal and uncodified law.

What does it mean to see like an Islamic state? In his influential work, *Seeing Like a State*, James Scott (1998) argues that the modern state acquires its distinctive form of power by rendering social life *legible*—that is, standardized, abstract, and calculable. For scholars of Islamic law, this story has the ring of truth. Prior to European colonization, we are told, *shari'a* was a largely uncodified and flexible system of norms, practices, and authoritative texts. This flexibility was one of the principal reasons for its success, as it allowed *shari'a* to adapt itself to the needs of the local populace. Under colonialism, however, that flexibility was lost. As part of the larger project of colonial state building, *shari'a* was transformed into a codified, rigid, and formalized system of law, one whose jurisdiction was typically limited to family and personal disputes. In this way, *shari'a* was rendered legible to colonial rulers, and while some postcolonial states have sought to "restore" the scope of Islamic law to encompass civil, criminal, and constitutional matters, those colonial-era reforms, we are told, remain largely intact.

But is this all there is to the story? My goal in this article is not to reject this account of Islamic legal history, but rather to explore its exceptions and lay out a scholarly agenda for their study.

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Because there *are* exceptions, instances of both a precolonial *shari'a* that was codified and incorporated into state structures, and a colonial and postcolonial *shari'a* that has, with the state's support, remained uncodified, flexible, and informal. These exceptions expand our understanding of the relationship between *shari'a* and the state, a relationship that is presented in much of the literature as one of tension and conflict. Indeed, some scholars have gone so far as to posit an "incompatibility" between *shari'a* and the state, owing to the latter's supposed hostility toward the flexibility and informality of the former (Abou El Fadl 2001; Hallaq 2013; Hamoudi 2010). I argue that this need not be the case.

In doing so, I build on two intuitions. The first is the recognition that the colonial and postcolonial state is a complex multivocal collection of institutions, ideologies, and interests. For example, within many colonial states, there was no straightforward distinction between colonizer and colonized; on the contrary, as recent scholarship has shown, European and North American governments were heavily dependent on "native" partners to establish and perpetuate colonial rule. These partners served as intermediaries, indispensable middle(wo)men capable of translating the social life of the colony into the language of the state (Benton 2002; Hussin 2016). As such, they were participants in projects of colonial legibility, but often for reasons of their own and using methods that were at cross-purposes to those of the metropole. Not only does this diversity mean that the state—colonial or otherwise—had no single way of "seeing," but it also means that not every actor engaged in projects of legibility was doing so in order to strengthen those in power.

The second intuition guiding this inquiry comes out of scholarship on legal pluralism. Rather than understanding legal diversity, redundancy, and contradiction exclusively as *obstacles* to state power, this literature views them as potential *solutions* to the problem of governing a normatively complex space. This can be especially true in colonial and postcolonial contexts, where ethnic, religious, and economic divides can be especially salient. In such contexts, projects designed to render the law legible may actually undermine other state objectives, such as security, social reform, or economic growth. Given the alternatives, the interests of those in power may be best served by keeping law flexible, ambiguous, and informal.

Taken together, these intuitions urge a rethinking of the relationship between *shari'a* and the modern state. In this approach, Islamic law as deployed by state institutions may be a *jurisgenerative* force, one capable of responding creatively to new problems or exploiting new opportunities, and, as such, it can act as a corrective to narratives of tension, conflict, and incompatibility that characterize much of the scholarship on Islamic law and the modern state.

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I develop this argument in the following four sections. In the first section, I explore the drawbacks of some of the approaches that stress the supposed tension or incompatibility between *shari'a* and the modern state. These approaches tend to exaggerate both the institutional and ideological unity of the state, creating the impression that states have essentially one way of "seeing." When enlisted to explain the development of modern Islamic law, the result is a history in which political action becomes curiously muted. In the second section, I develop an account of *shari'a*'s jurisgenerative potential, as well as why state actors might have an interest in cultivating that potential even at the expense of their own ability to understand or control the law. Lastly, in the third and fourth sections, I draw on empirical case studies from Sudan to illustrate how understanding *shari'a* as jurisgenerative can help us to make sense of twentieth-century legal reforms.

Islamic Law and the Language of the State

The precise relationship between *shari'a* and various kinds of political authority, including the modern state, is one of the most vexing issues in the academic study of Islamic law. A rare point of agreement is that the arrival of European colonial powers marks a moment of profound rupture in the Islamic legal tradition, one in which the moral, epistemological, and political bases of Islamic law were fundamentally transformed. Indeed, so sweeping was that transformation that it has led some scholars to proclaim Islamic law, in any meaningful sense, to be dead (Abou El Fadl 2001: 108; Hallaq 2004; Hamoudi 2010).

Why should this have been so? First, as part of the colonial state-building project, secular European legal codes were imposed on nearly all Muslim societies. These first codes were limited to criminal and commercial law, leaving Islamic judges (*qadis*) and jurisconsults (*muftis*) free to apply *shari'a* in family and customary disputes. However, as the ambitions of the colonial state continued to grow, European administrators began to codify Islamic law as well. Soon after, *qadis* and *muftis* were folded into formal judicial structures where they became civil servants within a rapidly expanding bureaucracy. With little practical autonomy, their decisions were expected to conform to the commercial and security imperatives of the colonial state. Finally, legal education, which had heretofore been carried out in independent *madrasas*, was taken over by state-run schools where legal pedagogy could be standardized, surveilled, and controlled. All of these steps left a profound effect on *shari'a*, leaving much of what remained unrecognizable.

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Some scholars have gone even further, claiming that these reforms mark the endpoint of a legal tradition stretching back nearly fourteen hundred years. According to this stronger version of the argument, *shari'a* and the modern state are fundamentally incompatible. Whereas *shari'a* is an informal collection of norms and practices, the law in the modern state is expressed through legal codes and formalized procedure. And while *shari'a* emerges organically out of the interaction between legal professionals and the communities they serve, with ultimate legislative sovereignty belonging to God, the modern state claims that sovereignty for itself. Finally, because Islamic law is flexible and pluralistic, it is impossible to square the Islamic legal tradition with "the modern nation-state's totalistic appropriation of [legal sovereignty]" or the state's relentless "compelling and pushing toward an exclusive and ultimate center" (Hallaq 2009: 362).

There are reasons, both empirical and theoretical, to be skeptical of these narratives, especially in their strong form. First, precolonial Muslim states were often much more deeply involved in the regulation and control of Islamic law than many accounts typically suggest. In Ottoman Egypt, for example, government-run tribunals known as *mazalim* courts regularly applied Islamic law to a range of public and private disputes (Baldwin 2016: 55–56). At the state's direction, new judicial offices were created and staffed with judges who adhered to the empire's preferred school of Islamic law (Burak 2013; Meshal 2010). And throughout the empire, the Ottoman state implemented reforms designed to establish the sultan as a sovereign-*cum*-legislator with the authority to codify Islamic law, resolve legal disputes, and institute a new religious orthodoxy (Fleischer 1992; Heyd 1973; Imber 1997).

While this more ambitious program was only ever partially realized (Imber 1997: 94–95), the Ottomans were successful in establishing significant state control over Islamic legal institutions, whether in major urban centers like Cairo (Baldwin 2016) and Aleppo (Fitzgerald 2016) or in distant provinces (Peirce 2003: 311–348). Moreover, this pattern was not limited to lands ruled by the Ottomans. Similar attempts to subject Islamic law to state-led regulation occurred in Mughal India, where support for legal codification had been growing among many Islamic scholars long before the era of colonial rule (Alam 2004; Pirbhai 2008). These developments were all part of a larger shift, visible following the thirteenth century throughout the Muslim world, away from the "jurist's law" of Islam's formative period and toward a more rigid content-oriented episteme in which something like codification could be contemplated (Ibrahim 2015).

This new wave of scholarship casts significant doubt on some of the more sweeping claims made by those suggesting an

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incompatibility between *shari'a* and the state. If legal regulation by the state was more widespread—and, importantly, if it had the support of more Muslim intellectuals and jurists than is typically thought—then reforms carried out during the colonial and postcolonial periods look less like an irreparable breach and more like an acceleration of trends already underway. We should be careful to not overstate the case or mitigate the violence of the colonial encounter, but recent research strongly suggests that political regulation and the codification of *shari'a* are, quite literally, part of the Islamic legal tradition.

Second, to this empirical critique, we can add a theoretical one as well. Because the strong version of this standard narrative attributes an inherent contradiction between Islamic law and the modern state, this analysis of Islamic legal politics tends to trace an arc toward instability. For example, some have argued that the incorporation of Islamic law into the state leads inevitably to autocracy, conjuring up images of the state feeding upon Islamic law, growing ever more powerful as the restraints that *shari'a* traditionally imposed on executive authority grow weak and fall away (Abou El Fadl 2001; Feldman 2008). It is thus suggested that genuine democracy or stable political rule will only be possible when Muslim societies either adopt Islamic law in its precolonial form (Hallaq 2013) or renounce *shari'a* altogether (An-Na'im 2008).

One of the consequences of this "tragic narrative" of Islamic law (Emon 2016) is that it leaves little space for genuine political action. Instead, all oppression becomes inevitable, all instability natural. Opportunities for cooperation, creativity, and productive contestation disappear, leaving in their wake a social field characterized by violence and confusion. As Andrew March points out, it is the reverse image of how the precolonial period is described, a "place without history" where all Muslims "were harmoniously woven into their paradigmatic society and pious subjectivity, and any departures from this were solely matters of human imperfection, not actual moral or spiritual conflict or disagreement," (March 2015: 843). Precolonial, postcolonial—either way—politics as such is a practical impossibility.

It is important to note that there is a counter-trend. In response to these critiques, some scholars have moved in the opposite direction, accepting the impossibility of the Islamic state *not* because modern states cannot be Islamic, but rather because they are not *states*, properly understood. Noah Salomon (2016), for example, argues that while the Islamic state in Sudan does exist, it is not to be found in the formal institutions of the Sudanese regime (its courts, bureaucracy, parliament, etc.). Rather, it is present in the aesthetics, soundscapes, and the lived practices of everyday life. Salomon's approach, which owes much to a Marxist

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structural analysis of the state (Abrams 1988; Althusser 1984; Mitchell 1991), returns Islamic law to the organic and informal environment it allegedly enjoyed during the premodern period: civil society. In this understanding, there is no such thing as "the state," properly speaking. Instead, there is only the cultural production of a "state effect" that delineates certain categories of action, speech, identity, and so forth as *of the state*. The advantage of this approach is that, unlike how purveyors of the tragic narrative center their analysis on conflict, rupture, and instability, it recognizes important continuities, collaborations, and experiments in worldbuilding. But this de-ontologizing of the state comes at a price—specifically, it obscures the reality of authority, hierarchy, and power that pervades political life, whether in Sudan or elsewhere.[1]

One direction leads to the naturalization of conflict and instability. The other leads to their marginalization. A key problem in both approaches is their exaggeration of the modern state's institutional and ideological coherence *in practice*. That is, these approaches take too seriously the story that the state tells about itself. While the modern Weberian state may, in certain instances, follow a logic of legal standardization, bureaucratization, and codification, there are alternative trajectories. Indeed, the power of the colonial and postcolonial state is often far more fragmented (Roitman 2005; Simpson 2014), its legal sovereignty much more uneven (Benton 2010; Comaroff and Comaroff 2006), and its commitment to legal standardization much less certain (Das 2004; Mantena 2010) than its own rhetoric would suggest.

Islamic Law and the Jurisprudence of Hybridity

In response to these critiques, I want to suggest that the formalization of Islamic law and its integration into the state can generate new kinds of political and legal meanings. Contrary to the "legibility" accounts described above, legal formalism and codification need not come at the expense of innovation, flexibility, or grassroots political action. Indeed, there is a long tradition of scholarship within legal theory that finds, in the interstices of formal legal systems and institutions, opportunities for new kinds of legal subjectivity, governing strategies, and modes of resistance. These sorts of openings are "jurisgenerative," in the sense that they are always creating new legal meanings that the state does not—*cannot*—anticipate (Benhabib 2011; Cover 1983).

[1] For a version of this response to Salomon's argument, see Hussin, Iza. "New Itineraries in the Study of Islam and the State." In *The Immanent Frame*, March 16, 2017: https://tif.ssrc.org/2017/03/16/new-itineraries-in-the-study-of-islam-and-the-state/.

In one sense, this dynamic is already the subject of a long-standing research agenda among Islamic legal scholars. A large body of literature explores how women, who one might expect to fare poorly under Islamic legal regimes, frequently turn *shari'a* to their advantage (Bowen 2003; Mir-Hosseini 2000; Peletz 2002; Stiles 2009; Tucker 1998). By taking up and creatively redeploying the state's own law, women can prevail in disputes involving marriage and divorce, child custody, and inheritance. As a result, women are able to use *shari'a* to challenge patriarchal gender relations. Scholars have also shown how attempts by the state to apply *shari'a* can generate new legal subjectivities and forms of legal consciousness among women that run counter to dominant state ideologies. This is true even in contexts where state-led projects of legal "Islamization" have been most thorough or expansive, such as Iran (Osanloo 2009 and 2012) or Saudi Arabia (Al-Rasheed 2013). Collectively, these studies reveal the striking contrast between the patriarchal laws promulgated by the state and new sorts of meanings or strategies that *shari'a* is capable of becoming in women's hands.

One of the lessons here is that the codification and standardization of Islamic law, which one might otherwise think help to consolidate state power, can also generate new strategies of resistance and subaltern claims-making. But, for that very reason, the converse is true as well: a *lack* of codification and standardization can also *benefit* the state. This sort of jurisgenesis has been observed by scholars studying the effects of colonialism on Muslim-majority contexts (Benton 2002; Stephens 2014), but most of this work focuses on the phenomenon as it pertains to secular law, not *shari'a*.[2] In part, this may be because such jurisgenesis contradicts the widely shared assumption, articulated most forcefully by James Scott (1998), that modern states acquire their distinctive brand of power through the standardization of social life. As Scott shows, such states face the challenge of ruling over a distant and diverse population, where local practices, vocabularies, and ways of knowing are often inaccessible to the state. Naming conventions, for example, can differ wildly from one community to the next. The rules of these conventions may be perfectly obvious to each community itself, but their variety and (often) their informality are obstacles to state rule. Without a common system of naming, how can the government produce a reliable census? And, without a reliable census, how will it know who to tax or by how much? In a very real sense, these populations are *illegible* to the state, rendering social control ineffective, if not impossible.

[2] An important exception is Hussin (2016).

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The solution, Scott claims, has been the standardization of names, as well as of currencies, units of measurement, and any other component of social life through which a state might wish to rule—including, crucially, the law. Although a local community might be well served by unwritten customs and informal rules, these undermine state power. As a result, most states have chosen to extinguish local custom, or at the very least to codify and incorporate custom into the national legal system. Thus, many legal systems become one, and uncodified custom becomes written statute. This is what it means to see like a state.

Scott's theory is compelling, and it accords with many of the colonial-era reforms implemented in Muslim-majority contexts. But it does not exhaust the possibilities of state rule, or capture all of the ways that states can see. On the contrary, in many instances, states intentionally *discourage* standardization or codification, rendering law illegible. Rather than dismiss such behavior as irrational or a sign of the state's disinterest in rule, we should consider the sorts of strategies for social control that an illegible law might make possible.

For an example of what such a strategy might look like, consider the multiple and overlapping jurisdictions of the U.S. legal system. Robert Cover (1981) argued that federal, state, and municipal jurisdictions, which are often contradictory to or in competition with one another, should not be viewed as a detriment to state power or a sign of legal chaos. On the contrary, it is partly because of these jurisdictional redundancies and lack of standardization that state law has been able to succeed. Multiple jurisdictions allow legal actors to innovate, permitting them to forum shop, compare outcomes, and develop new strategies. Governments at the subnational level can learn from one another, helping their neighbors to identify what works best and what does not; and for the unsuccessful litigant, who might otherwise turn in frustration to an extrajudicial remedy, the promise of another judge in another jurisdiction can help to keep that litigant within the ambit of state law. Thus, by permitting "the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of the courts," these contradictions help to ensure that the state will endure over the long term (Cover 1981: 682).

This argument has been deepened more recently by Paul Schiff Berman (2010), who argues that states should—and often do—intentionally cultivate what he calls a "jurisprudence of hybridity." In divided societies, reaching agreement on closely held norms is often impossible. In such contexts, attempts by the state to eradicate legal pluralism can lead to disaster. Enforcing a uniform system of law might generate fierce resistance, undermining the order that the state is eager to establish. And even

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were such a system of law to be successfully enforced, the state might find itself less prepared to respond to new and unexpected threats. Political rulers facing such a challenge would, Berman suggests, be better off "[seeking] to preserve the spaces of opportunity for contestation and local variation that legal pluralists have long documented," recognizing that "a focus on hybridity may at times be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult," (Berman 2010: 14).

Bonnie Honig (2005: 65–86) has made a similar argument, locating in the interstices of codified law new resources for political action. State bureaucrats, for example, operate in a world saturated by legal texts. As a result, one might assume that their range of action is relatively limited, hemmed in on all sides by institutional rules and procedure. Yet, through careful interpretation and deployment of those texts, those bureaucrats can use the law in unexpected and emancipatory ways. As Honig shows, each text adds more nuance and complexity to bureaucratic activity. In the process, they supply new exceptions, technicalities, and loopholes that can be exploited by a sufficiently creative civil servant. In this sense, codification does not prevent the bureaucrat from engaging in innovative forms of politics or policymaking. On the contrary, it helps to facilitate it.

The upshot is that uncertainty over the law—that is, law's illegibility to the state—can also generate new strategies for state rule. Applying this to a Muslim-majority context, Hussein Ali Agrama (2012) has shown how in Egypt, state secularism operates as a kind of "problem-space." Within this space, the tensions that exist over the proper role of Islamic law are continually generated and expressed: What is the relationship between secular courts and religious ones? Are non-Muslims subject to Islamic law? If so, what does that say about the nature of Egyptian citizenship? And if not, what law *are* they subject to? These sorts of questions, which have typically been settled by individual courts on an ad hoc basis and in contradictory ways, are the sorts of issues that standardization and codification, according to Scott, should be used to resolve. But as Agrama shows, standardization is precisely what the Egyptian state has refused to do. Not, as we might assume, because it lacks the capacity or political will, but rather because it is precisely by leaving these questions unresolved that the state justifies its continual intervention in the lives of its citizens. Each court case, each controversy over secularism and *shari'a*, creates another opportunity for state sovereignty to announce itself. To do otherwise—that is, to definitively *settle* these problems through decisive codification or standardization—would deprive the Egyptian state of one of its principal mechanisms for political

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action. Legal illegibility is not an obstacle to state power. Rather, it is one of its necessary components.

Building on this idea of illegible law as productive of state power, I focus next on two case studies from Sudan, one colonial and the other postcolonial. Sudan is an interesting case in which to explore this dynamic, both because of Sudan's deep legal pluralism and due to the wide scope its rulers have given to Islamic law. As I show, while Sudan's rulers did make some attempts to codify and standardize Islamic law, this was matched by a countertrend within the state pushing for legal informality and illegibility. The rulers' reasoning was straightforward: the more informal and uncodified the law, the greater speed and efficiency with which legal professionals could respond to threats to state rule. The result was a series of reforms by the state designed to block, and in some cases reverse, the codification and standardization of Islamic law.

Colonial Sudan and the Benefits of Illegibility

When a joint Anglo-Egyptian expeditionary force conquered Sudan in 1898, its victors encountered a legal system in profound disarray. Seventeen years earlier, Muhammad Ahmad bin Abd Allah, the son of a boatwright and an initiate into the Sammaniyya Sufi order, had proclaimed himself the Mahdi, or "expected one" of Islamic eschatology. From his base in western Sudan, he had raised an army and defeated the Turco-Egyptian government that had ruled the country since 1821. Once in power, the judicial system he established was both highly personalistic and skeptical of perceived legal "orthodoxy." As heir to the Prophet Muhammad, the Mahdi considered divine inspiration (*ilham*) to be one of the three primary sources of the law, along with the *sunnah* and the Qur'an. In practice, this meant that many legal decisions were made by the Mahdi personally and with little deference to traditional limits on *ijtihad*, or judicial discretion. As a result, the *ulama* and most other members of the Turco-Egyptian legal bureaucracy were shut out of the judicial process (Layish 2000: 221–238).

Following the Mahdi's death in 1885, his successor the Khalifa began to move toward a more bureaucratized system of judicial authority (Layish 1997: 38). However, this process was still incomplete at the time of the Anglo-Egyptian invasion. As a result, the incoming British and Egyptian administration encountered an extremely weak and pluralistic legal system. In the cities and towns, the influence of the old Turco-Egyptian courts, which followed the Hanafi *madhab* (a doctrinal school of Islamic law), could still be felt. Elsewhere in the north, the so-called native courts

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administered justice according to local custom (*'urf*) and the Maliki *madhab*. In the south, meanwhile, judicial authority was extremely fragmented, a consequence of the lack of central administration and the Mahdi's own failure to penetrate the *sudd*, the great southern swamp that extends for hundreds of miles south of the city of Fashoda.

One of the first tasks of the nascent colonial administration, therefore, was to establish a functioning judiciary. A dual legal system was created under the aegis of the newly formed Legal Department. All criminal disputes, as well as cases involving matters of contract, tort, property, and trade, were heard by a secular court system known as the Civil Division, which practiced British common law and was headed until 1955 by a British chief justice (Massoud 2013: 64–67). Matters of personal and family law, on the other hand, were heard by a special *Shari'a* Division led by a state-approved Grand Qāḍī. Along with the Board of Ulema, the *Shari'a* Division was charged with regulating the production of *fatwas*, overseeing religious instruction, and enforcing colonial control over *shari'a* courts. These tasks were undertaken by Egyptian *qadis*, who the British believed to be custodians of a more textual and orthodox *shari'a* than the supposedly more mystical and heterodox Sudanese. The Egyptians embraced their new roles enthusiastically, using their leverage over the codification process to bind Sudan to the Egyptian government (Sharkey 2003). Meanwhile, courses in Islamic law were taught in the newly established Gordon College Sheikhs' School, where the next generation of Islamic jurists were trained and credentialed.

So far, so legible. This story seems to follow the one described by James Scott, in which mounting legal rationalization and standardization eventually convert the law into a form visible to the state. But a closer look reveals important exceptions. Because of Sudan's deep pluralism and the fragile state of its judiciary, no attempt was made to centralize legal authority under a single hierarchy. Under the so-called closed door ordinances (a set of colonial policies forbidding northern Sudanese from entering the south), judicial power in the south followed a separate trajectory from the rest of the country. Legal authority was vested in village chiefs, many of whom were installed by the British and were largely shielded from direct regulation by the central colonial state (Leonardi 2013).

Meanwhile, in the Muslim north, the government's initial willingness to enforce Islamic legal "orthodoxy" shifted dramatically following the 1919 Egyptian Revolution, when Egyptian nationalists revolted against British rule. Though successfully put down, the 1919 Revolution alarmed the British and convinced many of them that the codification and institutionalization of *shari'a*, which

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the Egyptians had helped to implement, had been a mistake. A heavily textualized Islam, they feared, though more legible to the colonial state, was also less efficient, less responsive, and costlier. As one officer put it, "the more the government knew of a tribe's internal workings, the less successful [the tribe's] administration seemed to be" (Lea 1994: 5). There was also growing concern that Egyptian *qadis* in Sudan were using their position to foment pro-Egyptian (and anti-British) sentiment among the Sudanese populace. As a result, pressure to roll back legal legibility and limit the influence of formal legal institutions gradually grew, culminating with the drafting of the 1921 Milner Report. This report, hugely influential among the British, urged the government to abandon Sudanese projects of legal centralization and standardization.

> Though it is absolutely necessary for the present to maintain a single supreme authority over the whole of the Sudan, it is not desirable that the government of that country should be highly centralized. Having regard to its vast extent and the varied character of its inhabitants, the administration of its different parts should be left, as far as possible, in the hands of native authorities wherever they exist, under British supervision. The existing centralized bureaucracy is wholly unsuitable for the Sudan. Decentralisation and the employment wherever possible of native agencies for the simple administrative needs of the country, in its present stage of development, would make both for economy and efficiency (*Report of the Special Mission to Egypt* 1921: 34).

From the early 1920s forward, the Sudanese colonial regime scrambled to roll back what it termed "excessive rationalization," and to usher in instead a decentralized, informal version of Islamic law. This approach decidedly did not prevail everywhere; it was particularly marginal in major urban centers and large towns. But in rural areas where the majority of Sudanese lived, the British actively discouraged native elites from formalizing their legal powers or codifying their law.

This policy reached its apogee during the 1920s and 1930s, when the Sudanese colonial government instituted a policy of Native Administration (Mamdani 2012). Under that policy, the British administration greatly expanded the judicial authority of tribal chiefs, who under the guise of "customary law" decided cases according to the principles and practices of *shari'a*. And when some of those chiefs expressed an interest to the government in formalizing their authority, they were actively discouraged from doing so. Codifying custom and integrating themselves into the formal state apparatus, they were told, would undermine the very qualities that had made the tribes such effective bulwarks against nationalism. Better to be distant from, and even *illegible* to, the colonial

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state than risk spreading the anti-colonial contagion (Sachs 2013; Willis 2005). As one colonial officer caustically explained,

> The amalgamation of small tribes with larger ones, the forming of large tribes into confederations, the regularisation of customs by legal sanction all appeal to the tidy-minded administrator but native life is not framed on logical lines only, and by excessive formalisation the spirit of local custom may be sacrificed to the letter of administrative tidiness and the checks and balances of native life destroyed. (Hamilton 1935: 134).

Protecting these checks and balances, the natural rhythm of the tribal authority that kept the countryside free of nationalism, was a major priority for the colonial state—ranked even above the standardization or codification of the law. And when Sudanese judges and chiefs approached the colonial state to ask whether they should, as one offered, "write down and treat as 'cases' all the various small offences" they deal with, they were actively rebuffed (Willis 2005: 40). Illegibility was not understood as an obstacle to state power, but rather as one of its essential ingredients.

Accessing the "Uncodified *Shari'a*"

A similarly complex story unfolded some 50 years later, when Sudan's postcolonial government launched an ambitious program of state-led legal Islamization. Beginning in 1983 and ending with a democratic uprising in 1985, President Ja'far al-Numayri launched an ambitious program of political and legal reform known colloquially as the "Judicial Revolution" (*al-thawra al-qada'iyya*).[3] The centerpiece of this project was the introduction of new criminal, civil, and commercial codes based on Islamic law. In explaining the reason for these reforms, Numayri credited his new-found piety, which he claimed to have discovered after a brief imprisonment during the 1971 coup against his regime (Numayri 1980: 291). However, scholars note that he was likely also attempting to co-opt the Sudanese Muslim Brotherhood, which by the mid-1970s had grown quite popular (Fluehr-Lobban 1987; Layish and Warburg 2002; Massoud 2013). Meanwhile, Numayri's own base of support had begun to collapse amidst a financial crisis and the renewal of hostilities with southern Sudan. As a result, the regime was eager to attract new allies and reassert its legitimacy. The Judicial Revolution was intended to do both.

What did these reforms entail? First, new criminal, commercial, and civil codes based on Islamic law were promulgated by the

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

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government, including the notorious *hudud* laws.[4] *Qadis*, who up till then had been confined to specialized *shari'a* courts, were incorporated into the civil judiciary, where they presided over both religious and secular cases. Common law trained judges, meanwhile, were either summarily dismissed or forced to retrain in state-approved religious schools. And dozens of new Islamic courts were established throughout the countryside (a program known as "shortening the judicial shadow") in a bid to expand the regime's reach (Massoud 2013: 149). Cumulatively, these reforms were meant to simultaneously Islamize the judiciary, bring its judges to heel, and enforce the regime's interpretation of *shari'a*.

But again, complications immediately assert themselves. While the Sudanese regime did attempt to establish a more rigid and standardized version of Islamic law, this was matched by a counter-trend within the government based on the belief that a fully codified *shari'a* would weaken the state and undermine its control over the population. According to these voices, the principal value of *shari'a* was in its ability to cut through the "procedural prattle" that characterized the nation's legal system and arrive at speedy resolutions to difficult cases (Abdulsalam 2010: 47). At the time, tensions between the regime and the major opposition parties had erupted into violence and a long-simmering financial crisis was causing crime rates to soar. Under the new reforms, therefore, judges were encouraged to place a premium on securing "prompt justice" (*al-'adala al-najiza*).[5]

How would bringing the country's legal system into conformity with *shari'a* make it more efficient? The essential notion, common among many advocates for Islamic law in Sudan, is that law is most efficient and most beneficial when it tracks people's basic moral intuitions. Public law that conforms to a person's innate knowledge of right and wrong is easier both for that person to follow and for the state to implement. In Sudan, this was understood above all to entail a decisive break with the common law tradition, which was dismissed by many as a colonial import. Bringing the civil judiciary into conformity with *shari'a*, it was argued, meant that people's everyday behavior and intuitions would be functionally identical with the law itself.

Historically, the idea of a link between people's everyday moral intuitions and the content of *shari'a* has been an important

[4] The *hudud* are a class of punishments set out in the Qur'an for specific crimes, such as theft, highway robbery, and illicit sexual intercourse. Provided certain conditions are met, the punishment for these crimes can include flogging, limb amputation, or execution.

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

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strand in modern Islamic thought, one that Numayri made explicit in his *Al-Nahj al-Islami, li-Madha?* (The Islamic Path, Why?) In that work, Numayri argued that Islam is perfectly suited for humankind, and that as a result, it fulfills every human need or desire. According to Numayri, this is why Islam spread so quickly throughout the ancient world: it "did not lag behind people's aspirations" nor "exceed what they had been hoping for…. The call to Islam coincided exactly with the social and economic conditions of an age" (Numayri 1980: 71). While Numayri acknowledged that some had accused him of trying to "bring back the old," he insisted that it was precisely its age that makes *shari'a* so reliable. "Is [the implementation of *shari'a*] the return of the old? Yes – but the old is eternal, the old is everlasting, the old is absolute, going back to [the time of Adam]…Is it the return of the old? Yes, but it is the old that truly encompasses human nature (*fitra*)" (Numayri 1984: 183).

Hassan al-Turabi, Sudan's attorney general at the time and one of the principal architects of the judicial reforms, used a similar argument to justify both the adoption of *shari'a* and a rejection of codification. According to Turabi, the dual punches of "Greek logic" and colonialism had profoundly distorted the meaning of *shari'a* in the modern world. Rather than attend to the needs and problems of everyday people, Muslim judges had become fixated on "sterile categories of theory" that generate nothing but "endless debate" and have little to offer the modern Muslim (Turabi 1980: 5).

Turabi's solution to this problem was a total intellectual and methodological renewal (*tajdid*) of Islamic jurisprudence, starting with the rapid expansion of judicial discretion and flexibility. The traditional techniques used by the judge to interpret and adapt *shari'a* to individual circumstances (e.g., analogies, personal judgment, and the consideration of public interest) were too narrowly conceived and timidly applied. According to Turabi, what was needed was a more expansive (*wasi'*) version of these techniques, decisively wielded and driven at all times by a keen understanding of the needs of public life. In his writings, Turabi places special emphasis on *qiyas* (analogies) and *istishab* (the principle of legal continuity), which he believed could open up *shari'a* to the modern world (Turabi 1980: 24–28). Using this methodology, the judge can cut through the accretion of centuries of legal theory and get straight to the heart of matter: What is God's will?

As some scholars have noted, Turabi was unusually vague about what limits, if any, were to be placed on these methods (Hallaq 1997: 229–230). As a result, there would seem to be a danger that an emphasis on the public interest might lead a jurist to conclusions at odds with the plain meaning of revealed law or

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the interests of the regime. However, Turabi claimed that the judges would be guided in all things by their own innate moral instincts and intuitions. Once the principles of *shari'a* were accepted by the judges, their own human nature (*fitra*) and emotional sentiment (*wijdan*) would guide them toward the correct path.[6] Their moral intuitions would act as a sort of check on judicial excess, compelling them to remain within the boundaries of acceptable jurisprudence (Turabi 2010: 20–24). As a result, the state would have no need to fear an uncodified, flexible *shari'a*. Trusting in the power of human nature, Turabi believed that the state could have all of the benefits of a loose, responsive system of law with none of the drawbacks.

Two prominent court cases from the mid-1980s illustrate how uncodified *shari'a* was wielded by Sudan's judges. The first involved the outspoken cleric Mahmoud Muhammad Taha. The leader of the Republican Brothers movement and a prominent critic of the government, Taha was arrested in 1984 for circulating a pamphlet attacking the regime's legal reforms. The initial charges were for disturbing the peace, but these were soon elevated to include "undermining the Constitution" and "waging war against the state" (An-Na'im 1986: 206). Taha was duly convicted and sentenced to death, but at this point the Minister of Criminal Affairs made a surprising intervention. Suspecting perhaps that Taha's views had not be sufficiently repudiated, he inserted additional language into the indictment allowing the courts to apply uncodified *shari'a*. As a result, the Criminal Court of Appeal convicted Taha of apostasy (*ridda*), despite the fact that no such charge had ever been laid against him by the prosecutor. Indeed, apostasy was *not even a crime* under Sudan's penal code. Yet the Criminal Court of Appeal successfully argued that it was simply following *shari'a*, even if in doing so it was ignoring legislative statute.

The same court made similar use of uncodified *shari'a* in the case of Lalitt Ratnalal Shah. An Indian textile merchant with various business interests in Sudan, Shah was arrested in July 1984 and convicted of usury (*riba*). As with apostasy, usury was not a crime under Sudanese criminal law at the time. However, the Criminal Court of Appeal once again cited the "uncodified *shari'a*" in its judgment, arguing that because Islamic jurisprudence had long viewed usury as illicit, this superseded any statement to the contrary in Sudanese law. Moreover, the court then went on to issue a directive to the Bank of Sudan ordering it to cease all

[6] Numayri and Turabi are both drawing here on a powerful tradition within modern Islamic legal thought that asserts the fundamental harmony between the requirements of *shari'a* and the basic nature of humanity. See Griffel (2007), March (2009), and March (2010).

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transactions involving interest payments. This directive made no attempt to ground its legal reasoning in statute or judicial precedent, explaining instead that the court's fundamental duty was "to cleanse Sudanese society of all manifestations of ignorance (*jahiliyya*) and the remnants of colonialism in violation of the law of God." For that reason, it wrote, "any dealing in *riba*, authorized or not, will be subject to criminal liability by law (*qanun*) and *shari'a*."[7] In other words, both the codified and uncodified *shari'a* would be brought to bear on those who charged interest, regardless of what was actually stated in the Penal Code.

In other instances where codified law was deemed inadequate, Sudanese judges would cite the "eclectic expedient" (*takhayyur*). The eclectic expedient is a widely accepted principle of Islamic *fiqh* that allows a *qadi* to select from among the various Sunni *madhabs* when deciding a case. Historically, the dominant *madhab* in Sudan had been the Maliki, but this was displaced by the Hanafi following the Turco-Egyptian conquest of 1821. The eclectic expedient allowed Sudanese judges and legislators to shift between different *madhabs* as they saw fit, following for instance the Maliki evidentiary standard for crimes involving "illicit intercourse," but the Shafi school when punishing the consumption of alcohol (Layish and Warburg 2002: 118–121).

Depending on the legal issues involved, legislators could specify in statute which legal doctrine the judges were to follow. However, both the Criminal and the Civil Procedure Acts of 1983 give the Chief Justice and the High Court wide latitude to issue legal circulars mandating one *madhab* over another, regardless of what legislators might have intended (Layish and Warburg 2002: 117). Al-Mukashihfi Taha al-Kabbashi, himself a member of the High Court and president of the Criminal Court of Appeals in Omdurman during the early 1980s, made frequent use of this power. It was, he argued, an authority made necessary "because the doctrine of a given moment in time cannot meet the needs of [all] time and the changing public interest (*maslaha*) …especially in a country like Sudan, where there are so many tribes with different customs and traditions" (Al-Kabbashi 1986: 14).

This is not to suggest that judges or legislators saw no role for codification; far from it. Al-Kabbashi himself claimed that some degree of codification could help to "break the cycle of doctrinal sectarianism" and "remove confusion, chaos, and uncertainty in differing verdicts" (Al-Kabbashi 1986: 14). But he nonetheless insisted that wherever legislative statute and uncodified *shari'a* came into conflict, the latter would have to take priority. And while codification had many virtues, judges always had to be prepared to use

[7] Directive of the Criminal Court No. 1 (Omdurman) to the Bank of Sudan, 1984.

their own judicial discretion when the law was silent or deficient in some respect. This was the reasoning that Kabbashi used to justify his ruling in the Shah case: while the Criminal Code "did not provide for the death penalty in cases of *ribba* and did not make it a crime stipulated by law", usury was nevertheless illegal because "it is forbidden in all monotheistic religions" and had been unanimously condemned by Muslim jurists (Al-Kabbashi 1986: 27).

Scratching beneath the surface reveals that such appeals to "uncodified *shari'a*" or the eclectic expedient were common during the 1970s and 1980s. Like the colonial administrators some 60 years earlier, the postcolonial Sudanese state did not view uncodified or illegible law as necessarily a problem. Rather, so long as it remained with certain limits (themselves ill-defined), an illegible legal system could actually be a boon for the state, especially given the challenges associated with governing a deeply divided and polarized society. Of course, none of this is to say that no programs of rationalization or standardization were attempted in Sudan. Clearly they were. Rather, the point is that the actual legal landscape was far more pluralistic and ambiguous than theories that associate state power with legal legibility would suggest. Depending on the prevailing security situation, the vagaries of international politics, the financial constraints of local elites, the rivalries of judges, and the biases of government agents, the Sudanese state adopted wildly different stances on the nature of Islamic law. In some instances, this led to policies of codification and formalization. In others, it did not. And for *qadis* themselves, these reforms did not necessarily have to lead to their absorption into a unified and homogenizing state. On the contrary, in many cases it furnished them with new tools to assert their autonomy, settle old scores, and implement their visions for a just society.

Conclusion

The reforms implemented under colonial and postcolonial rule brought enormous disruption to the Islamic legal tradition, including the standardization and codification of *shari'a*. To use James Scott's terminology, these reforms were designed to render Islamic law "legible"—that is, abstract, standardized, and calculable. But there was an alternative path as well, one in which legibility was discouraged and the state chose to retain an uncodified *shari'a*. According to advocates of this path, by standardizing *shari'a* and rendering it legible, states risked undermining their own power, weakening their ability to quickly and intelligently respond to new threats or take advantage of new opportunities. These voices can be heard clearly in Sudan, where colonial and postcolonial rulers recognized in uncodified *shari'a* a valuable strategy for social control.

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Two circumstances are likely to make this strategy especially attractive to a state. The first is when state actors themselves are internally divided over key political questions. For example, if ruling elites believe that one of their agents has interests or objectives that contradict their own, they may be wary of any legal reform that might empower that agent. This was the case in colonial Sudan, where British administrators were concerned that Egyptian *qadis* were using the process of legal codification to promote nationalist and anti-colonial sentiment among the Sudanese. The colonial government's response was to discourage "excessive rationalization" of the law, blocking further codification. The second circumstance in which uncodified *shari'a* can become attractive to a state is when the population it governs is divided over important normative issues or is characterized by a deep legal pluralism. For states in this situation, a fully codified *shari'a* may be too rigid or inefficient to respond effectively to new threats or to take advantage of new opportunities. This was the challenge faced by the Numayri regime, which in response encouraged its judges to deploy Islamic law in sudden and innovative ways.

Taken as a whole, these findings illustrate the limitations of frameworks that posit a fundamental tension between uncodified *shari'a* and the modern state. Such a narrative presents the relationship between the two as antagonistic or exploitive. Some scholars have gone so far as to claim, as Wael Hallaq has, that the gulf between them is so great that because "[the] 'Islamic state,' judged by any standard definition of what the modern state represents, is both an impossibility and a contradiction in terms" (Hallaq 2013: ix). Because of their emphasis on tension and contradiction, these frameworks include little space for new forms of politics, governing strategies, or claims-making. By contrast, this article shows how and why states can cultivate, and ultimately come to rely on, uncodified and informal Islamic law. Such legal systems are jurisgenerative in that they facilitate new ways for a state to see, and ultimately, new ways to rule.

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