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Critical Dialogue

Domination Through Law: The Internationalization of Legal Norms in Postcolonial Africa. By Mohamed Sesay. Lanham, MD: Rowman & Littlefield Publishers, 2021. 226p. $120.00 cloth, $36.00 paper.

By Geoffrey Swenson

What role international actors can or should play in promoting the rule of law has generated extensive debate. In Domination through Law, Mohamed Sesay engages these debates with a thoughtful and provocative book. For him, claims about advancing the rule of law primarily function as a tool of domination that favors people and institutions better able to access the state legal system (p. 3). Consequently, Sesay contends that "international efforts, even when well intentioned, often end up reinforcing social domination in economies, polities, and societies" (p. 3).

Sesay's arguments are both theoretical and empirical. Chapter two offers a critique of rule of law from a postcolonial perspective positing that domination forms the throughline that links "Euro-American Imperialism, colonialism, [and] postcolonial structural adjustment programs to contemporary post-conflict peacebuilding and state-building" (p. 52). Modern law, he contends, remains profoundly colonial as evidenced by its Eurocentrism, superimposition, and emphasis on doctrinal legality.

Chapter three looks at legal order in Africa from the colonial period to the present. Sesay shows how international law and legal technicalities, ambiguities, and loopholes in instruments such as treaties underpinned attempts to legitimize colonialism. He highlights that non-state justice actors remain the most prevalent providers of legal order today, as is frequently the case throughout the Global South. These actors claim the right to adjudicate issues based on sources of legitimacy outside state-sanctioned law, such as religion or custom. He also shows how legal pluralism was employed strategically to perpetuate and consolidate colonial rule through the ability to discipline and reward customary leaders, and to determine what law applies, how it should be applied, and to whom it should be applied (pp. 72-80).

Chapters three through five turn to issues surrounding legal order in post-conflict Liberia and Sierra Leone. Both Liberia (1985–2005) and (Sierra Leone 1991–2002) experienced devastating conflicts. A key strength of the book is that Sesay's analysis is not limited to

conflicts and their aftermath but rather situates post-conflict realities in a broader historical analysis. Sierra Leone was a colony of the United Kingdom until 1961, while Liberia was never formally colonized. Nevertheless, leaders in both countries employed an indirect rule system wherein chiefs helped perpetuate the existing regimes even as they retained significant autonomy (pp. 88-96). This led to the establishment of dual, but decidedly unequal legal systems where a state legal system modeled on English law coexisted with customary law, or rather, a particular version of it.

Sesay examines how different legal regimes over time related to political power (Chapter 4), the economy (Chapter 5), and society (Chapter 6). Despite differences between countries, he finds an overarching trend that what he identifies as the rule of law has been used to serve the interests of an exclusionary elite at the expense of the population more generally. This dynamic, Sesay argues, persists in both countries, despite domestic policy and international aid ostensibly designed to promote the rule of law. Likewise, in the economic realm, Sesay argues that "the neo-liberal logic of legal reform" helps perpetuate an economic order that enriches a small elite, precludes the state from undertaking key social and redistribution functions, and leaves most of the population economically vulnerable with little access to justice (p. 141). Regarding society, Sesay maintains that the informal legal sector, despite its continued importance, remains systematically marginalized. In contrast, English law retains preeminence, and even dominance, while still excluding most people and disproportionately benefiting the wealthy, educated, and influential.

Domination through Law effectively and persuasively demonstrates how the post-war orders in Liberia and Sierra Leone failed to fulfill their promises, and how the international community contributed to that failure. Sesay's deep knowledge of both counties is apparent. He paints a vivid, compelling portrait of lived legal pluralism in both Sierra Leone and Liberia. In both states, he shows that non-state justice mechanisms serve a vital and often underappreciated role in providing justice, while not idealizing them. Moreover, this book makes it clear that not everything that is labeled rule of law actually achieves it or is even really trying to achieve it. Sesay illustrates that behind lofty rhetoric and grand ideas, legal realities can be decidedly different. The book serves as a timely reminder that simply because a legal system is affiliated with the state, it is not necessarily more just or more effective for most people. It is essential to understand how law, and legal pluralism, work in particular settings and how those dynamics relate to politics and culture more broadly. Domination through Law illustrates these connections clearly and compellingly in Liberia and Sierra Leone.

The book raises a few questions about how the rule of law is understood and assessed. Sesay's expertise on both countries is clear, but—in my opinion—the overarching relationship of these cases to the rule of law could be further strengthened. The definition of rule of law is not readily apparent. The closest statement I could find was: "Rebuilding the rule of law, which included transitional justice, law reform, and justice sector development, had also emerged as central to the international community's emphasis on post-conflict peacebuilding and reconstruction" (p.

1). It would be of interest to know a bit more about why exactly this formulation was chosen, especially as it leaves how we should define the rule of law a bit opaque.

The rule of law is an inherently contested concept. Nevertheless, scholars frequently draw a distinction between more minimalist and more maximalist understandings. At a minimum, the rule of law requires the law to be general, clear, stable, prospective, public, and universally applicable alongside the regulations and mechanisms necessary to adjudicate legal disputes nationwide and a sovereign government bound by the law. More extensive versions of the rule of law can include significant political, cultural, and economic requirements that, whatever their merits, would present an even greater challenge to establish.

Yet even relatively limited notions of the rule of law are not purely technocratic. As Jane Stromseth et al. highlighted in their important work on the rule of law after conflict, "most fundamentally, even the most formal minimalist conception of the rule of law requires a normative commitment to the project of the rule of law itself, a commitment to the orderly and nonviolent resolution of disputes and a willingness to be bound by the outcome of legal rules and processes" (see Can Might Make Rights?, 2006, p. 75). On this point, both Sesay and I agree as he approvingly quotes part of this same text (on p. 51).

The rule of law demands a normative commitment among state officials, including those at the highest echelons, to upholding and being bound by the law along with a cultural commitment to rule of law. Of course, these commitments do not guarantee that the substantive content of the law is wise, fair or just. The rule of law is not a panacea for every societal, economic, or political ill, but it nevertheless seems like a very worthwhile aspiration. Sesay repeatedly states he wants to eschew problem-solving approaches (e.g., pp. 13, 31, 188). This hesitation is understandable, as the book shows that legal and political dynamics are very complex. Nevertheless, it would be helpful for readers to learn more about what approaches and reforms Sesay believes may offer promising avenues for addressing the challenges facing Liberia and Sierra Leone.

This point may seem merely academic, but it is far from it. As Sesay's book amply demonstrates, for hundreds of years, regimes in Liberia and Sierra Leone lacked a normative commitment to even the most minimalist notion of the rule of law. Rather, these regimes seem more akin to the related concept of rule by law wherein the state legal order functions as a tool of regime authority and social control, but state leaders and other privileged elites are not committed to upholding, or required to follow, the law. This is a conception of law that Sesay draws upon without calling it as such (see pp. 184-185). International efforts to promote the rule of law achieved little in Liberia and Sierra Leone; however, the implication that this means the rule of law as a concept is synonymous with dominance or that this fact discredits the concept of the rule of law itself is less apparent. In the same way, the existence of war does not discredit the concept of peace.

The rule of law exists on a spectrum. No state fully and consistently upholds the rule of law and when regimes consistently fail to do so, they can rightly be criticized as such. As Sesay persuasively notes, this is one of many useful ways to assess legal orders, but it is not the only one (p. 4-5). Rule of law is not a substitute for being concerned about substantive justice, fairness, equality, opportunity, and other important issues.

Likewise, while Sesay makes compelling arguments regarding the lack of progress toward the rule of law in Liberia and Sierra Leone, the application of insights rooted in these cases to other states could be explained a bit further. All post-conflict states face challenges, but they are also distinct. Leaders of post-conflict states can embrace rule of law ideals of their own volition and work towards those goals in practice in partnership with international actors as I contend occurred in Timor-Leste, which here is cited among a litany of post-conflict international law and governance failures (p. 2).

Timor-Leste endured centuries of Portuguese colonialism dating back to the sixteenth century followed by a brutal invasion and occupation by Indonesia from 1975 to 1999. As I argue in my book, both elites and the broader population, including non-state justice elites, explicitly embraced rule of law ideals as a key component of their prolonged struggle against Indonesian occupation. When the independence movement ultimately triumphed and the country became independent in 2002, both rules of law ideals and establishing a workable, legitimate relationship between state and non-state justice were key priorities. While Timor-Leste still faces a host of political, economic, and social challenges and has yet to establish the rule of law by any definition, it has established a legitimate legal order and made admirable progress in a very tough setting. It is now a consolidated democracy and the only country in Southeast Asia rated "free" by Freedom House. While domestic actors deserve the most credit, international assistance played a modest but important role.

These inquiries, however, should not detract from the book's many virtues. Chief among these is the rich, vivid, and persuasive account of legal, political, and economic development in Sierra Leone and Liberia that spans centuries. More broadly, the book offers a valuable corrective to the popular discourse that it is enough to simply focus on the state justice system and that anything claiming to be the rule of law should be taken at face value.

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Mohamed Sesay replies:

I would like to thank Geoffrey Swenson for his thorough and constructive review of my book *Domination through Law.* I am particularly pleased that Swenson appreciates the book as a

timely and valuable corrective to international rule of law promotion. Among Swenson's inquiries is the crucial, but unresolved, question of how we understand and assess the rule of law. Indeed, the literature posits thin and thick definitions of the rule of law, depending on whether one stresses the procedural standards or their normative contents. But as Swenson notes, referring to our mutual appreciation of Stromseth et al.'s work (2006), there is little gain in getting mired in this open-ended conceptual debate when the rule of law in form somehow implies a normative commitment. While I see the analytical utility of making a conceptual distinction between minimalist and maximalist rule of law, I focus on transitional justice, law reform, and justice sector development as what those (re)building the rule of law do (or purport to do) in war-torn countries. These interventions, in my view, constitute both thin and thick aspirations. I understand Swenson's concern that my formulation seems unclear, but this provides something tangible to focus on amid an ongoing conceptual debate about what to assess.

I understand Swenson's call that I back my hesitation with adopting a problem-solving perspective with a prescription of alternative approaches and reforms for addressing the challenges facing war-torn countries like Sierra Leone and Liberia. It is undisputable that both countries are grappling with challenges that warrant the kind of remedy rule of law promoters claim they offer. But my postcolonial critique of internationalization of legal norms is not a repudiation of the concept of the rule of law, an idea that is not unique to liberal democracies. I do not disagree with Swenson that the rule of law is a "very worthwhile aspiration." Thus, rather than prescribing an alternative to the rule of law, what I draw attention to is the urgent need to decolonize the procedural and normative legal standards being internationalized. Decolonizing international rule of law is particularly imperative in the context of legal pluralism, where questions about whose law and standards become *the rule* are deeply political, a reality that Swenson also grapples with in his instructive work on Afghanistan and Timor-Leste. The rule of law project has remained impervious to this critical scrutiny because it is masked in a veneer of ideological neutrality, universality, separation from politics, and discontinuity from imperialism.

Finally, I recognize the value of works that take these assumptions as given and then focus on explaining why international rule of law has worked in some contexts and not in others. Swenson draws from Timor-Leste to make a compelling argument about how leaders who are committed to embracing the rule of law can partner with international actors to establish thin rule of law. However, the overall empirical record on this project has been disappointing—Swenson even admits that Timor-Leste still falls short of minimum rule of law ideals. Sierra Leone and Liberia are illustrative not only of an environment where the ruling class has been unwilling to subject itself to the rule of law and international assistance insufficient to the task of rebuilding an accountable legal system, issues that can be addressed within the liberal framework of intervention. These cases also represent a fundamental problem with the framework itself—it remains so steeped in coloniality that those already privileged by the dominant system disproportionately benefit from what is promoted at the expense of those reformers promise to help.