
In an age given to hyperbole, one hesitates to call any short book a masterpiece. Yet that tribute may legitimately be awarded to Abdullahi An-Na’im’s *African Constitutionalism and the Role of Islam*. The book examines the contingent role of Islam in the experiences of selected African countries contending with the challenges of postcolonial nation-building and constitution-making. It offers an explanatory narrative on “the relationship between Islam, as an ancient and extremely diverse religious tradition, on the one hand, and constitutionalism as a modern secular doctrine of governance and rights, on the other.” (8)

An-Na’im presents an analysis of the development of African constitutionalism, as assessed through the historical experiences of nine countries: a first group of countries, Ethiopia, Ghana, Guinea, Rwanda, Tanzania and Uganda, that have witnessed varying degrees of “incremental success” in the development of constitutionalism (63-98); and, a second group, Sudan, Nigeria and Senegal (132-159), that offer illustrative examples of the contingent role of Islam in constitutional development in Africa. These case studies represent a cross-section of countries with different colonial and postcolonial experiences, political and cultural profiles. (63) These groups might loosely be distinguished as states in which Islam has not been a patent factor in constitutional development and those in which it has played a more purposeful and contingent role, either in the entire territorial-state (or “nation-state”) or in a constituent part of the state. Taken together, these case studies provide a brief but useful resource on constitutionalism, human rights, law, politics, and the history of Islam in Africa.

The public profiles of constitutionalism, human rights and the rule of law in Africa have changed significantly over the past twenty-five years, largely as a result of the struggles for justice, human rights and democracy that have marked the African political landscape since the end of the cold war. This period has witnessed either the adoption of new constitutions incorporating fully-fledged bills of rights in a number of African countries or significant reforms to existing constitutions. The last two decades of the twentieth century not only witnessed Africa’s so-called “second wave” of democratization, but were also a period of
renewed experiments in constitutional design and reform. In many ways, however, these changes only manifest the most recent stages in the evolution of a long process of the development of African constitutionalism whose roots go back to the period of late colonialism and the immediate postcolonial era.

These developments and the discourses they have spawned are premised on the existence of a conceptual nexus between democracy and human rights as prerequisites for ensuring justice, and on the assumption that Western liberal democracy and notions of constitutionalism provide the political framework that is most consonant with human rights. The book under review partly interrogates this assumption, and seeks to demonstrate the possibility of an alternative interpretive approach to constitutionalism. This approach borrows from the principles of Western liberalism while reclaiming, and drawing upon, the traditional, pre-colonial, and colonial socio-political and cultural reality and experiences of African societies to construct a scheme of an African constitutionalism. (31-58)

An-Na’im sketches out an argument for an inclusive theory of constitutionalism in the opening chapter. Here, he discusses the problem of defining and implementing constitutionalism in general, and of the circumstances and assumptions associated with its introduction in late colonial and early postcolonial Africa. He concludes that a study of Western constitutional experiences (Great Britain, France and the U.S.) reveals the unavoidable relativity and contingency of constitutionalism everywhere, and thus that this concept cannot be viewed as a single ideal principle that various societies have systematically and progressively realized on the basis of a master plan. (25) The concept of constitutionalism must therefore be understood as an abstraction from the cumulative experiences of various societies rather than as a preconceived notion of what ought to be. This analysis leads to the conclusion that the Western notion of constitutionalism should not be viewed as a fixed, immutable or timeless construct capable of universal application in all countries and societies without the need for specific adaptation to accommodate country-specific contexts. Further, in constructing an inclusive theory of constitutionalism, there is a need to go beyond the binary approach that insists on drawing sharp dichotomies between these various notions. An-Na’im provides a fresh examination of the old arguments relating to the universality and relativity of constitutionalism, and makes a persuasive argument in favor of drawing upon indigenous and pre-colonial African traditions of political, social and cultural thought and practice in reconceptualizing the meaning of
constitutionalism. Such an inclusive theory of constitutionalism makes it possible for us to appreciate better the role of Islam as both a belief or religious system and a way of life, and the notion of “incremental success” in constitutional developments in Africa.

The core elements of An-Na’im’s conception of African constitutionalism are laid out in Chapter Two. This is neither presented as some kind of meta-theory of African constitutionalism nor is it intended to be a specific type of constitutionalism that is peculiarly African or as some experience or feature that is applicable to the entire continent with all its diversity. Rather, An-Na’im’s objective is to identify “aspects of what might be called African constitutional values, institutions, and experiences, examine some relevant features of the traditional values and institutions of certain parts of the continent that can be reclaimed as antecedents of constitutionalism in each society or subregion.” (31) In addition, using the case studies, he outlines some of the constitutional experiences of African societies during the colonial and postcolonial periods as integral parts of the same process of incremental success through practice for each society. What he presents, then, are “tentative and contested” elements of African constitutionalism, which include a reformulated notion of sovereignty as a foundation and rationale for constitutionalism itself. The elements also include a standard for assessing particular constitutional experiences, and the notions of human rights and human dignity as providing the substantive content for the sovereignty standard of constitutionalism. (62) In brief, An-Na’im focuses on substantive rather than procedural constitutionalism.

This notion of constitutionalism suggests a commitment to a certain conception of democracy—described by some as “integrative democracy”—predicated on three constitutive principles: the principle of participation, which guarantees each individual a role to participate in or make a difference to the character of political decisions; the principle of equal stake, under which every individual is treated as an equal under any collective decisions so as to count as a full member of the political community; and the principle of independence, which allows each member of the political community to see moral and ethical decisions as her responsibility rather than the responsibility of the collective unit. A notion of constitutionalism that goes beyond form and, instead, focuses on content is one that enshrines the pursuit of substantive goals at the center of the practice of democratic governance itself.

An-Na’im’s discussion of African constitutionalism in both its conceptual and practical aspects underscores two pertinent points about
the development of constitutionalism as a universal project. First, the evolution of constitutionalism has been a product of concrete social struggles, not simply textual or legal discourse. Secondly, the new constitutionalism is as much about the protection of civil and political rights as about economic, social and cultural rights. These points are not self-evident and are sometimes glossed over in the debates about human rights, democracy and constitutionalism. Furthermore, writings and debates on these issues, as they relate to Africa, often suffer from certain analytical shortcomings. They tend to be idealistic, legalistic and ethnocentric. They are idealistic in that discussion of human rights and constitutionalism is often reduced to an examination of ideas abstracted from social history, so that these values are seen as the outcome of concepts, not conflicts, insights not instigations, philosophy not politics. They are legalistic in that their provenance is primarily located in the courts, not culture, procedure not practice, rhetoric not reality, codes not contingency. They are ethnocentric in that the source of the concept of constitutionalism is usually located in the West by both universalists and relativists.

What this book shows is that a historical and materialist analysis of human rights and constitutionalism demonstrates the limits of these approaches. In reading An-Na’im, we would do well to remember that Africans have their own histories of struggle and human rights preoccupations that, in very complex ways, are linked to, but distinct from, struggles and preoccupations in other parts of the world. I would also argue that the Western appropriation of the idea of constitutionalism, coupled with universalist approaches to human rights, encourages both orientalist and relativist readings of African (and also Asian) cultures and legal systems, both of which oversimplify their histories. Furthermore, such orientalist discourses are based on a racist assumption of fundamental Western superiority and African (or Asian) inferiority, and posit seemingly ineradicable distinctions between the Western and non-Western worlds, in which the former is constructed as modern, urbane and dynamic, while the latter is traditional, rural and static. African (and Asian) cultures, reputedly characterized by tradition, despotism, and irrationality, are seen as inherently opposed to notions of constitutionalism, human rights and the rule of law. This prejudice has been amplified in the post-9/11 period, in particular, against societies that also embrace Islamic faith and culture.

An-Na’im engages to a limited extent with this key question of the relevance and implications of arguments for the universality of constitutional principles and human rights for multicultural and
pluralistic societies in Africa. (16-20) The author has not confronted the "universalism versus cultural relativism" debate in extensive detail. While this debate can at times sound hackneyed, it is important for African human rights and constitutional scholars to remind the world that although cultural relativism is a fact of discourses on human rights and constitutionalism, it should serve not as a means of suppression, but as a launching pad for the enjoyment and enforcement of human rights. It should function as an expression and guarantee of local self-determination rather than as an excuse for oppression, arbitrary rule, and despotism.

The conceptual framework laid out in the first and second chapters provides the essential background for examining the practical experiences of some African countries in adapting and indigenizing the essentially alien concept of constitutionalism undertaken in Chapter Three. An-Na’im’s objective is clear enough: to promote constitutional governance in African societies by developing ways of enhancing and consolidating the basis of the incremental success of constitutionalism, while recognizing the various degrees of failure and setbacks suffered in the process as an integral aspect of this linear progression. But the core of this book is to be found in Chapters Four and Five. The latter chapter, especially, provides a fascinating argument for the contingent role of Islam in the development and implementation of African constitutionalism, and offers an assessment of how such constitutionalism may be made sustainable.

In a larger sense, two related questions that often arise in debates about the role of religion in public life and current Islamic scholarship underlie this discussion. As related specifically to Islamic law or Shari‘a, the first question asks: how compatible is Islam with political modernity and modern notions of constitutionalism, democracy and human rights? The second relates to the issue of whether, and where, a boundary should be drawn between religion and the modern state, i.e., the place of religion in the public space. In addressing these questions An-Na’im cautions against generalized conclusions drawn from the experiences of countries with their own specificities (in this case Nigeria, Senegal and Sudan) and accepts that each society has to negotiate the relationship between Islam and constitutionalism through practice and over time. (154) He recognizes that certain historical understandings of Shari‘a are fundamentally incompatible with fundamental principles of constitutional governance and human rights. Crucially, he rejects the notion of an Islamic state as conceptually impossible, historically inaccurate, and practically untenable in modern...
times. (154) Nevertheless, he makes the case that

the role of Islam in the development of constitutionalism in Islamic countries should be taken seriously, without either unduly exaggerating or belittling it, both as a general theoretical matter and in relation to the situation in any particular country. (153-154)

This book seeks to uncover and contextualize the role of Islam and by implication Islamic law or Shari’a in the incremental development of African constitutionalism, but it is not a general discussion on the substantive content of Islamic law as such. Shari’a, which began to evolve during the early wars of conquest following the Prophet’s death but took its definite form some two hundred years later at the apogee of the Muslim empire, lies at the core of Islam, a religion intended above all to shape human behavior (orthopraxis) and not merely belief (orthodoxy). The role of Islam and Islamic law in the constitutional traditions and history of African states is illustrated in the three case studies offered in Chapter Five on Sudan (133-138), Nigeria (139-145), and Senegal. (145-153) In each case, An-Na’im provides a brief historical account of the role of Islam in the various constitutional experiments in these countries in the postcolonial period, charting the increasing role of Islamic law in these constitutional orders. He offers cautious conclusions: in relation to Sudan he suggests that

peace and national unity in Sudan cannot be achieved or maintained on the basis of the establishment of an Islamic state and application of Shari’a, simply because to do so is to repudiate any foundation for self-determination for women and non-Muslim citizens. (156)

And this, in his view, would negate the rationale for constitutionalism, which is the enjoyment of equal rights by all citizens of the country. As regards Nigeria, he concludes that recent developments in that country (in the attempts by the northern states within the Nigerian federation to institute local Islamic legal systems) illustrate the difficulties of accepting a political role for Islam while resisting the enforcement of Shari’a by the state. (157)

However, An-Na’im finds Senegal’s experiences in negotiating the relationship between state and religion and, specifically, the role of Islam in the constitutional order instructive, and draws four important conclusions: first, a strict interpretation of religious texts tends to undermine constitutionalism, especially when it leads to the total conflation of religion and government. Second, Sufi Islam (which he describes as the dominant form of Africanized Islam) appears to be more open to diverse interpretations and therefore more amenable to the
separation of state and religion. Third, a mutual accommodation between state and religious authorities operates best as an informal, tacit understanding, rather than on official or institutional terms. Finally, an economic and social role for religious authorities can facilitate the autonomy of religious communities, which will then reduce the importance of direct control of the state apparatus. (158)

Another conclusion that one could draw from An-Na’im’s discussion of these cases is that even in those situations where conscious attempts have been made in African states to uphold the authority of Shari’a or Islamic law through the constitution, the statutory provisions regulating conduct in these legal systems remain largely secular (drawn from the imposed English common law or European civil law of the colonial era), except for the regulation of what is commonly termed the law of personal status (usually the law of persons, marriage and divorce). This is as true of Sudan as it is (but perhaps less so) of Senegal and the northern Nigerian states that have officially adopted Shari’a: the reality is that Muslim citizens in these contexts have to operate in a system predominantly consisting of secular law, even as the state proclaims adherence to an Islamic constitutional order. As An-Na’im’s discussion generally reveals, such constitutional aspirations to an Islamic order must be understood in their proper context as an indication of postcolonial concerns with social and political identity.

Throughout the book, An-Na’im presents a skillfully woven narrative that contextualizes historical events with their related dominant political personalities and key political moments in the countries under examination, from Emperor Haile Selassie’s thread-bare, seven-article constitution of Ethiopia of 1931 to the more elaborate multiple constitutions enacted by successive regimes—both military juntas and civilian governments—in countries such as Ghana, Uganda and Tanzania. The aim here is to demonstrate that these countries have gone through these agonizing stages, trying out various experiments in constitution-making, in order to arrive at what one might call the “right” formula.

Meanwhile, An-Na’im rejects an analysis which seeks to subject these African experiences “to an arbitrary dichotomy of ‘success or failure’ according to some preconceived notions of where it is supposed to be along the way to perfect or total constitutionalism.” (98) Rather, he agrees that these developments should be construed as necessary steps in Africa’s distinctive experience in the incremental success of constitutionalism and that the contested role of Islam in constitutionalism in Africa should be understood as part of this process.
of incremental process. His masterful analysis of the contingency of Islam and its indigenization and appropriation in constitutional development in Africa avoids the simplistic explanations that tend to view these processes as nothing more than a manifestation of the political energies of radical religious zealots or fundamentalist and intolerant politicians.

It is difficult to find fault with such a finely argued thesis, especially when the reviewer is generally in agreement with the author on the substance. However, one minor quibble may be excused. One of An-Na’im’s declared concerns in the preface to the book (xi-xii) is the current global context of a very destructive trend in the foreign policy of the U.S. in the aftermath of the 9/11 terrorist attacks which, in his view, has had two consequences that affect the objectives of his book. He recognizes, first, that the post-9/11 environment has created a serious challenge to some of the most fundamental principles of international legality and undermined the credibility of notions of universal standards of human rights and constitutionalism everywhere, especially among Islamic societies. Second, it has created or enhanced a preexisting “siege mentality” among Islamic societies, thus making them more conservative and defensive about their religious and cultural identities and making it less likely that they would engage in internal transformation in favor of constitutional governance and human rights than they were a few years ago.

Some readers will, therefore, be disappointed to discover that An-Na’im does not go beyond this well articulated concern about the misuse of religion in international relations in the discussion that follows. This is especially relevant given his own observation that this global environment has been compounded by the manner in which the U.S. is seeking to influence the domestic policies of African and Islamic governments that are vulnerable to American economic, political and security pressure to adopt oppressive legislation and policies.

Given his own views on the role of socially engaged scholars who combine rigorous scholarship and advocacy for social and political change, some substantive discussion of this issue would have been important for informing public policy in the present international contexts in which some governments seek to rationalize extraordinary and oppressive measures in the name of waging a war against terrorism and what is variously, if controversially, termed Islamic fundamentalism, radical extremism and Islamo-fascism.

That said, I can only reiterate that I find this short book provides a powerful and insightful analysis of a complex and, to some, problematic
subject. All in all, this intellectually coherent study should present the legal community, policymakers and human rights and constitutional scholars, as well as students of Africa in general, with useful insights into the relevance of the concepts of constitutionalism and the rule of law in the ongoing debates about Islam, human rights, good governance and democracy in Africa.

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