

1-3-1986

Law and Development: The Rule of Law in Developing Countries

Abdullahi Ahmed An-Na'im

Follow this and additional works at: <http://scholar.valpo.edu/twls>

Recommended Citation

An-Na'im, Abdullahi Ahmed (1986) "Law and Development: The Rule of Law in Developing Countries," *Third World Legal Studies*: Vol. 5, Article 3.

Available at: <http://scholar.valpo.edu/twls/vol5/iss1/3>

This Article is brought to you for free and open access by the Valparaíso University Law School at ValpoScholar. It has been accepted for inclusion in Third World Legal Studies by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

LAW AND DEVELOPMENT: THE RULE OF LAW IN DEVELOPING COUNTRIES

Abdullahi Ahmed An-Na'im, Ph.D.*

It is interesting to note, at the outset, that Law and Development is not taught at the University of Khartoum, the Sudan, where I teach regularly. Such a course, moreover, is not even likely to be introduced in the foreseeable future because we do not have the resources to deal adequately with more basic legal subjects.

When I went to the University of California at Los Angeles as visiting professor of law in 1985, I found that a course on Law and Development used to be offered but had been discontinued for several years. Although it was convenient to use the approved course title when I took up the teaching of this subject, I needed to reflect my own interest and expertise; so I added the subtitle: *The Rule of Law in Developing Countries*. In this way, the title reflected the comparative constitutional law and human rights issues that I wanted to cover in the course.

Theoretical Framework

However conceived, development involves collective decision-making and implementation of development policies, including decisions on the meaning and objectives of development and determination of national priorities and tactics. To what extent is the law, and in particular constitutional law, relevant to this process? How are fundamental rights safeguarded, if at all? Are these conceived as individual justiciable rights to be legally asserted against the state in the Anglo-American sense of rights? Or is there an alternative indigenous conception of collective and individual "rights" to be mediated through some other method?

The colonial experience of most developing countries has effectively destroyed or at least severely disrupted preexisting traditional structures and mechanisms for political organization and purported to replace them

* Associate Professor of Law, University of Khartoum; Visiting Professor of Law, College of Law, University of Saskatchewan.

with models derived from the experience of the metropolitan colonial powers. Consequently, all developing countries have evolved into national states based on some form of constitutional structure, often expressed in a written constitution. It is within this framework that the peoples of these countries have sought to assert their right to self-determination and attempted to exercise their sovereignty in defining and seeking to achieve what they perceived to be their own development.

Given this state of affairs, it would seem logical to start by examining the basic characteristics and underlying assumptions of the constitutional model of a national state. In particular, the Anglo-American model of constitutionalism, as modified and adapted for application in former British and American colonies needs to be examined. How was this model modified and adapted? Was it successful in achieving its purported objectives? What alternatives were available at independence? Is this concern with constitutionalism and the rule of law meaningful to the masses of the population of the particular countries and does it provide them with effective access to policy-making and implementation processes that affect their vital concerns and aspirations? If not, what needs to be done at this level to achieve effective popular participation? It may even be queried whether popular participation itself is relevant and desirable, and from whose point of view?

However one approaches this area of concern, she or he would be reacting to Western theories and experiences, both in formulating questions and seeking to answer them. This is not necessarily a bad or wrong thing to do, but the fact nevertheless needs to be recognized. For better and for worse, the world has forever been changed by the rise of colonialism and international capitalism and their liberal ideology, including their theories of law and development. Even those countries such as Tanzania, which sought to break the yoke of exploitation and dependence through the adoption of indigenous models and the promotion of traditional institutions, have continued to employ at least the symbolism of constitutionalism and the rule of law as vehicles of national and international legitimacy. The realities of the international economic order, moreover, have forced these experimental regimes to compromise their ideals and modify their policies in the interest of political stability and economic success. The 1985 Constitution of the United Republic of Tanzania, for example, has included a bill of rights for the first time since independence and despite earlier official opposition to the very concept of a bill of rights.

Course Structure and Methodology

Within this framework, the course on the rule of law in developing countries which I taught twice at the University of California, Los Angeles (UCLA) School of Law in 1985-87 evolved around the following structure and methodology. Following an introductory overview of the recent history of the developing countries of Africa and Asia, the course explored some of the initial questions of development: Which countries are described as developing countries? What are the assumptions of this characterization? What caused these countries to become underdeveloped in the first place? Development of what or whom, by whom, and by which means to which ends?

In recognition of the fact that the legal manifestation of these and other questions involved the examination of questions of constitutionalism and the rule of law, especially of the Anglo-American model, the course proceeded to determine the basic characteristics and features of this model. The writings of established authors such as S.A. de Smith, K.C. Wheare and B.O. Nwabueze and statements by groups such as the International Commission of Jurists on the meaning of constitutionalism and the rule of law are discussed at this stage. This leads to discussion of specific questions such as the role of the judiciary and the assumptions and prerequisites on which this role is based in the Anglo-American tradition. Another major feature of this model of constitutionalism is the liberal ideals of fundamental individual rights and the mechanisms and procedures for safeguarding them against encroachment by the state.

The theory and practice of constitutionalism and the rule of law in developing countries is then examined against the theoretical model established earlier. Independence constitutions are considered to see how they adapted and adopted the Anglo-American constitutional model, including their schemes for individual and minority rights. Post-independence crises often lead to serious challenge to the independence constitution through the incidence of secession, states of emergency and revolutionary change. These constitutional crises are examined in light of some of the most common responses, the assertion of extraordinary powers, especially preventive detention and suppression of political dissent. The role of the judiciary under states of emergency and revolutionary situations is examined to determine how effective the judiciary has been in upholding the constitutional scheme under these extreme circumstances.

This general part of the course concludes with a discussion of economic and social development and its implications for constitutionalism. The

alleged dichotomy between civil and political rights, on the one hand, and social, economic and cultural rights, on the other hand, is discussed at this stage. Also considered is the question of priorities and trade-offs often asserted by elites in their purported pursuit of objectives of political stability, national security and economic development.

Choice of developing countries surveyed in the general part was limited by the instructor's and students' knowledge of the Anglo-American model and the relevant countries. China, former French colonies and Latin American countries were therefore excluded from the general theoretical discussion. Nevertheless, Argentina and Chile were covered in the next stage of specific country-studies and some students selected Latin American countries for their final papers.

The course then concludes with case-studies of five to seven developing countries. Students are involved in the choice of countries, making class presentations and leading the discussion of the relevant questions in relation to the countries of their choice. These presentations and discussions are usually done by students who have selected the particular countries as subjects of their own term papers in lieu of writing an examination.

Although the students are given the option of either writing a paper or taking a final examination, the majority prefer to write a paper. I have found that students tend to write high-quality papers because they usually have a special, often personal, interest in the countries they choose as subjects for their papers. The class presentation and discussion is very helpful, even to those students who select for their papers countries not covered in the case-studies.

Bibliography

Due to the lack of an appropriate textbook, I had to compile a volume of articles and chapters from various books and add materials on the countries selected for case-studies. The list of books used in readings for the course include the following:

1. S.A. de Smith, *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964).
2. International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: ICJ, 1966).
3. B.O. Nwabueze, *Constitutionalism in the Emergent States* (Cranbury, NJ: Fairleigh Dickinson Univ. Pr., 1973).
4. Kenneth L. Karst & Keith S. Rosenn, *Law and Development in Latin America, A Case Book* (Berkeley, CA: U. of Cal. Pr., 1975).

5. B.O. Nwabueze, *Judicialism in Commonwealth Africa* (NY: St. Martin's Pr., 1977).

6. International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva, ICJ, 1983).

7. George W. Shepherd & Ved P. Nanda, *Human Rights and Third World Development* (Westport, CT: Greenwood Pr., 1985).

8. M.L. Marasinghe & William E. Conklin, eds., *Essays on Third World Perspectives in Jurisprudence* (Singapore, Malayan Law Journal Pte., 1984).

9. Claude E. Welch & Ronald I. Meltzer, eds., *Human Rights and Development in Africa* (Albany, NY: State U. N.Y. Pr., 1984).

10. Rhoda E. Howard, *Human Rights in Commonwealth Africa* (Totowa, NJ: Rowman & Littlefield, 1986).

Articles from various law and political science journals were also used in the course.

For cases to illustrate the role of the judiciary, or lack thereof, extensive reference was made to *Law Reports of the Commonwealth: Constitutional and Administrative Law Reports*, 1985 and 1986 (Abingdon, Oxfordshire, Professional Books).

Introductory material and constitutional provisions for the countries used in the case-studies were taken from Blaustein & Flanz, *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y., Oceana Publications, 1971- (looseleaf)). Background information on these countries was also taken from the Foreign Area Studies services of the American University, Department of the Army, Washington, D.C. [The publication is now: *Area Handbooks* (Washington, D.C.: Library of Congress).]

Conclusions

I was impressed by the fact that the majority of students start the course with a very strong bias in favor of the American model of constitutionalism and the rule of law and end up being at least ambivalent, if not opposed, to the imposition of this model on developing countries. Although neither the instructor nor the students are clear on the appropriate model for these countries, the common conclusion has been that the Anglo-American model, at least in its classic formulation, is not the answer.

One conclusion, shared by the majority of students, was that the appropriate model cannot possibly be determined in a classroom of an American law school. The model for each particular country will have to be negotiated by the permanent population with reference to cultural norms and political realities prevailing in that country. Nevertheless, there

was the feeling that such models have to conform to certain minimum universal standards which are to be established through comparative analysis of state practice and relevant human rights documents.

I was also impressed by the feeling, expressed by some students, that the law may not be as significant in the experience of developing countries as they had thought or would like to think. The impression that I now share with many of my students is that the law as such may have a very limited role in the dynamic process of government and social change. The significance of the law and efficacy of courts and lawyers may increase at a subsequent stage, but it was felt that this does not seem to be the present stage for developing countries.

I am therefore grateful to my students, and to the experience of taking this course with them, for helping me to appreciate the complexity of the field of law and development and the dominant role of cultural, political and economic factors in government and development.