

4-25-2007

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Recommended Citation

Robinson, Paul H. and Zulfiqar, Adnan, "Of Neocolonialism, Common Law and Uncodifiable Shari'a: A Reply to Professor An-Na'im" (2007). *Faculty Scholarship*. Paper 152.

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Of Neocolonialism, Common Law and Uncodifiable Shari'a: A Reply to Professor An-Na'im

PAUL H ROBINSON AND ADNAN ZULFIQAR*

What every criminal justice system requires, and what criminal law ideally strives to provide, is first, a clear *ex ante* statement of the criminal law's rules of conduct by which people can govern their lives, and secondly, a clear statement of the liability and punishment rules by which a violation of those rules-of-conduct will be adjudicated.¹ The success of a criminal law in performing these two central functions depends upon clarity. Vagueness or ambiguity quickly undermines a criminal law's performance by depriving citizens of fair notice of what the criminal law demands of them, introducing the potential for the abuse of discretion, undermining uniformity in application among similar offenders and offences, and shifting criminalisation authority to judges who are left to provide a useable rule because the vague or ambiguous law fails to do so.

Although the Qur'an and Prophetic Traditions contain many seemingly clear legislative pronouncements, the fact is that these foundational texts have been filtered in innumerable ways through the *fiqh* literature produced by private Muslim legal scholars over the course of a millennium or more. Thus, the body of scholarly opinion and interpretation that has elaborated the shari'a contains a stunningly broad range of opinions on almost all matters of doctrine. This central fact in the history of the shari'a illustrates the practical difficulties of relying directly upon the *fiqh* literature to guide a working criminal justice system. If even the scholars disagree, what hope does the system have to provide its users with the clear and unambiguous rules that fairness and effectiveness require?² As many Muslim nations have increasingly come to understand, in the modern era of centralised government, codification of criminal law is the only effective means by which criminal law can perform its core functions.

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¹ See generally Robinson, PH (1990) 'Rules of Conduct and Principles of Adjudication' (57) *University of Chicago Law Review* 729; Robinson, PH (1997) *Structure and Function in Criminal Law* Clarendon Press at 8-9, part III.

² This observation is not new. In 1961, Muhammad Asad noted that the 'need for a codification of Islamic law' suffers from the fact that 'Muslims are presented with a gigantic, many sided edifice of *fiqhi* deductions and interpretations', see Asad, M (1980) [1961] *The Principles of State and Government in Islam* Dar al-Andalus at 100. He goes on to note that 'none of the existing *fiqhi* systems truly corresponds to the needs of our time, being largely the outcome of deductions conditioned by the experience of a time very much different from our own', id at 101.

Admittedly, there are advantages to the discretion and elasticity that an uncodified system provides. These attributes were particularly valuable in pre-Ottoman times to fill the void left in a world without strong central governments. The Anglo-American common law tradition grew from many of the same political and social forces. Many countries continued to cling to their common law systems long after the common law conditions had passed — indeed, a few still do. However, the benefits of codification — in providing fair notice, limiting abuse of discretion, increasing uniformity in application and reducing the making of criminal law by judges — has had its inevitable effect. The list of countries around the world that have moved from uncodified criminal law to codification gets longer every year. In contrast, we know of no society in human history that, having experienced the virtues of codified criminal law, has voluntarily chosen to revert back to an uncodified system.

The Maldives seeks the virtues of codified criminal law. That decision is hardly surprising, even among Muslim nations, many of which have headed down the codification road, albeit none as far as the Maldivians plan to. (It can also be argued that Muslim administrators in classical times pursued similar objectives.)³ The Maldives is an Islamic country that cherishes shari'a and wishes to enshrine shari'a's rules and principles in the law that governs the daily lives of its citizens. Thus, the Maldivians obviously want their new codification to embody those shari'a rules and principles, just as the pre-existing criminal law of the Maldives did. All the Maldivians need is the format and structure necessary for an effective penal code. Enter our Criminal Law Research Group, hired by the United Nations Development Programme and the Maldivian government to use our codification expertise to help the Maldivians make that conversion.

What is it in this story that has so outraged Professor An-Na'im? What is it exactly about the project, which at first glance seems quite desirable, that leads him to object to it so vehemently?

The answer to that question is not quite clear. Professor An-Na'im begins his comment on our article reporting on the project by saying that his complaint 'is limited to challenging the claim [...] that the drafting process [...] constitutes codification of shari'a'; he does not 'offer any assessment of the draft code as such'.⁴ But his comments that follow clearly do not simply object to our labelling, our *calling it* a codification of shari'a; his comments challenge both the project itself and 'offer a [quite critical] assessment of the draft code'. Even there, one is never quite sure what his objection is: at different points he seems to suggest that his complaint is that we are trying to do something that cannot be done, or that we are doing something that can be done, but we did it badly, or that we are doing something that can be done but should not be done, or, one wonders, whether we are just

³ See, eg, Layish, A (2004) 'The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World' (44) *Die Welt Des Islams* 86 (noting that in the 8th century, Ibn al-Muqaffa is reported to have suggested to the Caliph al-Mansur that he should, through 'administrative decree', bring about a comprehensive codification of the law to ensure uniformity); Khaled Abou El Fadl (2004-05) 'The Place of Ethical Obligations in Islamic Law' (4) *UCLA Journal of Islamic and Near Eastern Law* 1 at 23-24 (discussing Caliph Abu Ja'far al-Mansur's attempts at codifying Malik's *Muwatta*); Fadel, M (1996) 'The Social Logic of Taqlid and the Rise of the Mukhatasar' (3) *Islamic Law and Society* 224 at note 124 (relating the pseudo-codification of Maliki law that took place under Sultan Muhammad b 'Abd Allah, d 1790).

⁴ An-Na'im, AA (2007) 'A Brief Comment on the Maldives Penal Code Project: Failure to Take Shari'a Seriously, Not "Codifying" It' (2) *Journal of Comparative Law* at 54, ¶1, lines 1 and 3. References hereafter will refer to An-Na'im Comment with paragraph and line number.

doing something in a way that is different from the way Professor An-Na'im would do it. It does not help that his comments are more tirade than critique. (We thought comparing the project to the invasion of Iraq a particularly appalling low point.⁵) Nor does it help that he often assumes facts in direct conflict with the reality made clear by the article.⁶

For codifiers around the world, this is not an unfamiliar situation. Sometimes the greatest challenge for a codifier is to organise the chaos of conflicting cases, statutes and practices that exist in a jurisdiction. We can draw upon our standard skill set to organise the various possible objections that we think Professor An-Na'im might be making at one point or another. Below are what we take to be the most plausible possibilities and our response to each. (The passages in his comments that seem to suggest each complaint are set out in the footnotes.)

1 Shari'a Cannot Be Codified⁷

Professor An-Na'im cannot really mean that the rules and principles of shari'a are impossible to codify. If shari'a has any real world effect — if it can ever produce a rule to be followed — then that rule can be written down. His real objection must be something more nuanced than this (see some possibilities below).

2 Shari'a Should Not Be Codified⁸

In making this particular objection, he is something of an outlier among modern Islamic scholars and Muslim governments.⁹ The somewhat obvious difficulty with this point of view is that it would condemn the Maldives' criminal justice system to permanent ineffectiveness,

⁵ An-Na'im Comment ¶20, lines 1 and 3.

⁶ Part of the problem in this regard may be that Professor An-Na'im's comments seem less a response to the article and the project described therein, and more a comment on a one page email that Robinson sent to Daniel Pipes responding to Pipes' criticism of the project before it began. See the first several pages of Professor An-Na'im's comments. (The email is cited in the article at note 10 and reproduced in an appendix.) Given the nature of his comments, they might have been more usefully posted on Pipes' website as a comment on Robinson's email rather than published here as a comment on our article.

⁷ An-Na'im Comment ¶1, lines 4 and 5 ('To be clear about my own position from the outset, I do not believe that any aspect of shari'a can [...] be enacted as state law').

⁸ An-Na'im Comment ¶1, lines 4 and 5 ('To be clear about my own position from the outset, I do not believe that any aspect of shari'a [...] should be enacted as state law'); id at ¶1, lines 7, 8, 9 ('the incoherence and illegitimacy of attempting to codify shari'a is part of the reason I am suggesting that this should not be attempted in the first place').

⁹ For example, codification occurred regularly in Muslim countries during the 20th century. See 'Shari'a' in Bearman, PJ et al (eds) *Encyclopaedia of Islam* (2nd ed) Brill (discussing codification in general in Muslim countries); Horowitz, D (1994) 'The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change' (42) *American Journal of Comparative Law* 555-56 (discussing codification of Islamic law in Malaysia); Zubaida, S (1988) 'An Islamic State? The Case of Iran' (153) *Middle East Report* 4 (noting the calls for codification in Iran in the 1980s); Shalakany, A (2001) 'Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise' (8) *Islamic Law and Society* 229 (discussing Egypt); see generally, Schacht, J (1959) 'Islamic Law in Contemporary States' (8) *American Journal of Comparative Law* 133 (discussing a variety of Muslim nations and codification). This is not to say that there are not opponents of codification among Muslim governments, most prominently Saudi Arabia, but they are in the clear minority, see Mayer, AE (1987) 'Law and Religion in the Muslim Middle East' (35) *American Journal of Comparative Law* 155; Vogel, FE (2000) *Islamic Law and Legal System: Studies of Saudi Arabia* Brill at 361 (we are grateful to Sulaiman Al-Turki for this reference). As Vogel concludes, 'Islamic law itself is not unalterably opposed to codification' and even in Saudi Arabia there is an ongoing debate on the subject, id at 311-315.

for all the reasons summarised at the beginning of this essay (and discussed in somewhat greater detail in part IV of the article). The absence of a clear and unambiguous statement of the rules of conduct and of the adjudication rules would condemn a society to a system of criminal punishments without fair notice of the conduct that is criminal; increase the potential for abuse of discretion; increase the likelihood of disparity in the adjudication of similar cases; and de facto delegate the criminalisation authority to judges. As noted above, in opposing codification Professor An-Na'im is resisting the overwhelming trend of modern human history.

3 Islamic Countries May Codify Criminal Laws but Codification Should Not Be Based upon the Rules and Principles of Shari'a¹⁰

This would seem a genuinely bizarre position. If an Islamic country cherishes shari'a, why would it ever consider codifying criminal laws that were not based upon shari'a? No one can seriously claim that a Muslim country ought to adopt a criminal code that deviates from shari'a for the sake of deviating.

4 Shari'a Cannot Be Codified in the Sense That by Codifying It One Alters Its Interpretive, Uncodified Nature¹¹

Right. Obviously. The point is definitional, without substantive content. One no longer has traditional, uncodified shari'a if one codifies it, just as, if one codifies the common law, once codified it is no longer common law. (We have already addressed above in item 2 the issue of whether uncodified shari'a *should* be codified. While Professor An-Na'im may see value in an uncodified criminal law that is subject to a variety of interpretations, such lack of codification has serious costs by producing unfairness and injustice, which the Maldivians apparently do not wish to bear.)

5 Shari'a Cannot Be Properly Codified by Anyone except a Muslim/Anyone except a Shari'a Scholar¹²

We certainly agree that there are good reasons for why a criminal law codification based upon shari'a should be guided by Muslims and by shari'a scholars, but it is hard to see how this can be a complaint against the Maldivian project, given that all of the codification decisions in the Draft Code were made by Maldivians, all of whom are Muslim and some of whom are shari'a scholars. Our contribution (most of us, but not all of us, being non-

¹⁰ Apparently, Professor An-Na'im (in places) does not seem to object to the codification of criminal law in Muslim countries. See, eg, An-Na'im Comment ¶19, lines 9-11 ('This draft may be a good criminal code for the Maldives, but it should not be represented as a codification of shari'a at all. It is, in fact, the exact opposite of that claim'). If Muslim codification is fine, then what else could he mean when he claims that shari'a nonetheless should not be codified, other than the obviously untenable claim we address here?

¹¹ This statement of objection is an attempt to give some meaning to Professor An-Na'im's claim in item 1 above that shari'a cannot be codified. If it is obviously untenable to claim that it cannot be done, as we note above, what else, we asked, might he mean by such a claim?

¹² See, eg, An-Na'im Comment ¶7, lines 7-10 (suggesting that an American law professor and his assistants were in a poor position to do the project, especially given that they did not have time, in his view, to become serious shari'a experts).

Muslims and non-shari'a scholars) was to provide modern criminal code drafting expertise. Obviously, a good deal of knowledge of shari'a was necessary in the group for it to be effective in providing that help, but the success of the project did not depend upon the degree of *our* shari'a expertise.

6 The Decision to Codify, and Our Participation in the Maldivian Codification Project, Was a Shameful Exercise in Neocolonialism¹³

When Professor An-Na'im offers this kind of complaint he seems to have his facts wrong again. The decision to codify was made by the Maldivians before we were even aware that such a project had been undertaken.¹⁴ It was the Maldivians and the United Nations Development Programme (not exactly an overbearing colonial power) who came to us to ask for our help. These facts are all clear from our article. One wonders how this particular idea came into Professor An-Na'im's head.¹⁵ (That he would complain that criminal law codifiers would deal with 'local elites'¹⁶ is at best naïve and at worst disingenuous. If the end goal of the project is to have legislation passed, then it would seem difficult to reach that goal without dealing with those persons who will pass the laws: the executive and legislative branches of government.)

7 The Codification Project Was a Bad Idea because It Was a Government Project and Professor An-Na'im Believes the Maldivian Government To Be Insufficiently Democratic¹⁷

Here the Professor has things exactly backwards. A political analysis of the genesis of the codification project makes clear that it was not a vehicle for governmental oppression, but rather it was undertaken because of popular pressure on the government. Our article recounts the public unrest that led to the government's promise to undertake this reform, as part of a programme of larger reforms, including constitutional reforms. The project was pressed by the reformers in government, supported by the political opposition and by international human rights groups.¹⁸ It was pressed *on* the old guard, not *by* them.¹⁹

¹³ This is the underlying tenor of many of his comments, but he also is explicit in this claim. See, eg, An-Na'im Comment ¶17, line 10-11 ('The neocolonial nature of this process comes out loud and clear').

¹⁴ Available at: <<http://web.amnesty.org/library/Index/ENGASA290012005>> (noting that the new penal code was one of the reforms agreed upon by the government); 'Government Admits "Stupidity" of [Old] Penal Code' (13 June 2006) *Minivan News* (discussing the government's admission that the penal code needed to be reformed as requested by the opposition), available at: <<http://www.minivannews.com/news/news.php?id=2174>>.

¹⁵ Professor An-Na'im bases many of his suspicions not on the project facts or documents, the Draft Code or our article, but rather on Robinson's 'attitude' (An-Na'im Comment ¶2, line 4) reflected in his email to Daniel Pipes in reply to Pipes' criticism of the project. See note 6 above. It is hard to see the grounds for such suspicions with this project, even in the 'attitude' of the email. (We encourage readers to read the email for themselves in the article's appendix.)

¹⁶ An-Na'im Comment ¶6, lines 9-10.

¹⁷ This is a common An-Na'im theme. See, eg, An-Na'im Comment ¶17, lines 5-8 ('If the Maldives is truly a "working democracy", which is a doubtful claim').

¹⁸ For example, Amnesty International has specifically noted that the 'lack of an authoritative penal code' in the Maldives has caused 'serious human rights concerns' because people are unclear about 'what constitutes a recognizably criminal offence', see Amnesty International (24 February 2005) 'Maldives: Human Rights Violations in the Context of Political Reforms', available at: <<http://web.amnesty.org/library/Index/ENGASA290012005>>.

¹⁹ An opposition newspaper, for example, described the project as one of several measures aiming to end

Professor An-Na'im conveniently fails to mention that the actual sponsor of the project, and our employer, was not the Maldivian government, but rather the United Nations Development Programme, hardly a promoter of anti-democratic or oppressive policies. And, as our article recounts, the drafting and consultation process was one that involved a wide range of people, in all branches of government and outside of it.

Ultimately, however, we think that a political analysis of the project's genesis and execution is largely irrelevant. We do not really care about the identity of those who support penal law codification or what their motives are. The fact is that codification is the right thing to do to promote justice and fairness, and we are pleased to see support for the project from whatever quarter it comes. Ultimately, it will be the Maldivian parliament, which now includes an active opposition party, that will determine the final content of any penal code. The only potential tragedy for the Maldivian people will be that nay-sayers like Professor An-Na'im give apparent legitimacy to those forces who oppose the clarity, transparency and predictability that codification would bring.

8 The Codification Project Was Done Badly because It Sometimes Gets Shari'a Wrong²⁰

If what Professor An-Na'im means by *getting shari'a wrong* is that the Draft Code relied upon interpretations of shari'a that sometimes differ from those of Professor An-Na'im, we think that this is quite possible, but irrelevant.²¹ If what Professor An-Na'im means by *getting shari'a wrong* is that the Draft Code relied upon interpretations of shari'a that differ from those of any respected shari'a scholars, then we can only conclude that Professor An-Na'im has not looked at the Draft Code and its Official Commentary. If he had, he would find that all aspects of the Draft Code are based upon either (1) an interpretation of shari'a by a recognised authority (all of whom, we would venture, have as much or greater

government oppression: 'The Roadmap: New Maldives Victorious Over Old' (29 March 2006) *Minivan News*, available at: <<http://www.minivannews.com/news/news.php?id=1943>>. See also note 14 above (anti-government newspaper hailing the penal code reform project).

²⁰ An-Na'im Comment ¶11, lines 6-8 ('If this is the understanding [the authors] had of such an elementary, yet foundational, matter, how can one expect them to make an accurate determination of any shari'a principle?'); id at ¶18, lines 1 and 2 ('the authors do not seem to have sufficient understanding of shari'a').

²¹ Some of the points that Professor An-Na'im uses to demonstrate that we have got shari'a wrong are simply gross misstatements of what the article says. For example, he opines: 'It is wrong by any view of shari'a as commonly understood by Muslims everywhere, including the Maldives, to claim that hudud do not constitute an integral part of shari'a', An-Na'im Comment ¶15, lines 1-3. We challenge Professor An-Na'im to find any place where we make any such claim that 'hudud do not constitute an integral part of shari'a'. Certainly, there is no hint of this in the passage of ours that he cites. In another instance, Professor An-Na'im accuses us of suggesting that shari'a contains 'no fixed rules'. What the article actually says is: 'To summarise, shari'a is *not simply* a collection of fixed rules, but rather a narrative to be interpreted in a way that draws from it God's meaning. Indeed, it is not a series of fixed rules at all but *more* a body of principles and a variety of juristic interpretations', article at 9 (emphasis added). We think it difficult to draw Professor An-Na'im's conclusion that we claim shari'a has 'no fixed rules' from these sentences.

The other examples that he gives to show that we have shari'a wrong are simply cases where his interpretation of shari'a differs from that of the shari'a scholars upon whom we rely (and who we and the Maldivians think are as or more authoritative than Professor An-Na'im). For example, Professor An-Na'im aims to illustrate our 'lack of knowledge' of shari'a by pointing to flaws in our definition of *Sunna* (as if the background information for the general reader was relevant to the project), An-Na'im Comment ¶11. In fact, the view we give exists in both classical and modern scholarship. See, eg, Yusuf ibn 'Abd Allah ibn 'Abd al-Barr (2000) *Jami' bayan al-ilm wa fadlih* Dar al-Kutub al-Ilmiyyah at 276-77; Muhammad b Idris al-Shafi'i (1979) *al-Risala* Dar al-Turath at 357-58; Amin Ahsan Islahi (2000) *Mabadi taddabur-e-hadith* Faran Foundation.

credibility among shari'a scholars as Professor An-Na'im), or (2) in a few cases, such as those discussed in part III of the article, an explicit decision by the Maldivians to adopt a rule that they knew departed from classical shari'a, in form if not in spirit. In each instance, the ultimate judgment about what constituted the shari'a rule was a decision made by Maldivians. It is not clear why one should prefer Professor An-Na'im's interpretation of shari'a over that of the Maldivians or of the authorities cited in the Official Commentary.

Professor An-Na'im at one point concedes our reliance upon the Maldivians, but turns it into a complaint, presumably because the Maldivians should not be trusted to determine what shari'a requires: 'the authors apparently take "Islamic law and Maldivian values" as simply whatever the government of the Maldives told them about these matters'.²² Again, his criticisms seem internally inconsistent. We are to be condemned for being neocolonialists who are imposing our Western values, but also to be condemned for following Maldivian views. We think reasonable people looking at the facts would come to a view that he is wrong on both counts: we did not impose our views and it was proper to follow the Maldivian view of shari'a (and, as the article makes clear, we did not rely only upon *the government's* view).²³

9 The Codification Project Was Done Badly because It Sometimes Does Not Follow Shari'a²⁴

As Professor An-Na'im is well aware, Muslim countries vary in the extent to which their criminal law tracks traditional shari'a rules, and shari'a scholars reflect a similar range of opinion about how closely the literal text should be followed.²⁵ Few Muslim countries in practice apply traditional shari'a rules without exception or deviation, and few shari'a scholars think that they should. Even if one assumed that deviation from the literal text was a valid ground for complaint, it is not a complaint that can be directed towards us. Again, all decisions on whether to depart from the classical shari'a rule were made by Maldivians, which, of course, is as it must be, for it is the Maldivians who bind themselves by the Draft Code.

10 The Codification Project Was Done Badly because It Did Not Follow the 'Methodology and Legitimate Process' of Shari'a²⁶

Unfortunately, Professor An-Na'im never says just what 'methodology and legitimate process' of shari'a he thinks we failed to follow. (There is a certain awkwardness in Professor An-Na'im claiming that we failed to follow proper methodology, for he also

²² An-Na'im Comment ¶8, lines 1-3.

²³ See, eg, article at notes 8 (noting the public and private support for the Draft Code project offered by the country's leading Islamic authority).

²⁴ For example, An-Na'im Comment ¶15 (objecting to the Draft Code's failure to include all of the *hudud* offences in their strict and literal form).

²⁵ See, eg, article at notes 28 and 29; see also, Khaled Abou El Fadl (20004-05) 'The Place of Ethical Obligations in Islamic Law' (4) *UCLA Journal of Islamic and Near Eastern Law* 1 at 12-13 (discussing a different approach to *hudud* punishments); Javed Ahmed Ghamidi (2001) *Mizan* Dar al-Ishraq at 277-280.

²⁶ An-Na'im Comment ¶13, line 5. He may (or may not) have the same objection in mind when, at another point, he laments our lack of appreciation of the 'conceptual and methodological integrity of shari'a', id at ¶2, line 2.

claims that shari'a cannot be codified. See item 1 above. Is it that shari'a cannot be codified, or that it can be, but only if one uses the proper 'methodology and legitimate process'? If this is simply another form of his claim that we got shari'a wrong (see item 8 above) or another form of his claim that the elasticity and opacity of ad hoc decision-making is to be preferred over the clarity and predictability of codification (see item 2 above), then our response is the same as above.²⁷

It is possible that Professor An-Na'im has other or different complaints than these ten, but if so, he will need to be clearer about what they are.

CONCLUSION

Imprecision, lack of clarity and the resulting confusion are something we can work around when it appears in scholarly comments, as here, but when such qualities exist in a criminal law by which people will be judged and punished, it creates misery, unfairness and injustice in the daily lives of real people. Although we recognise that any project as complex as this will inevitably have flaws, we do not think that Professor An-Na'im has yet given a credible reason for why the Maldivian project was not a good thing to do or for why it was not done well.

²⁷ If, when he mentions 'methodology', Professor An-Na'im is referring to the literature pertaining to methodologies for discovering the law, *usul al-fiqh*, we can only point out that *usul al-fiqh* was not relevant to our work since, for our purposes, the rules were already discovered and our project was simply one of putting them in the appropriate legislative-literary form.