

## **Islamic Family Law in a Changing World: A Global Resource Book**

Abdullahi A. An-Na'im, ed.  
London: Zed Books, 2002

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Women Living Under Muslim Laws  
H-NET BOOK REVIEW Published by H-Gender-MidEast@h-net.msu.edu (February 2004)

### ***Shari'a* Has Never Been and Should Never Be the Basis for Family Law**

As the quintessential identity battleground, family law in Muslim countries and communities is one of the hottest political and developmental topics. Those situated within these contexts constantly find themselves struggling for progressive or (more often than not) against regressive reform, while for those with the outsider's gaze, 'understanding' Muslim communities is currently a major preoccupation.

In this context, a book which consciously explodes the myths – propounded by cultural relativists and fundamentalists alike – of one homogenous 'Muslim world' and the immutability of Muslim laws, and is edited by one of the field's most respected progressive scholars, must be warmly welcomed.

Muslim men, since the earliest days of Islam, have taken women-friendly positions and today some of the most outstanding gender-sensitive theological interpretations are being produced by men; yet this fact is often overlooked. This is particularly true among academic and policy-making circles outside Muslim contexts, where short-

sighted political correctness has produced a form of segregation whereby only women are to propound upon gender relations in Islam and Muslim societies. It is therefore significant that the present book, which seeks to highlight the human rights of women, be primarily the work of a male scholar.

In all cultures, women are the pivotal territories, markers and reproducers of the narratives of nations and other collectivities.<sup>1</sup> In the case of Muslim societies this has had two identifiable outcomes. Firstly, fundamentalist forces and states that have failed to build alternative national identities have focused their politicization of identity on women – invariably through dress codes and/or family law. As women activists and researchers in many Muslim contexts have noted, the family is the site of women's most immediate and daily experience of imposed definitions of gender appropriate roles, and it is also where the converging influence of customs, culture (including religion), and laws (frequently justified with reference to religion) is most vivid.<sup>2</sup> Secondly, as Leila Ahmed argues, women have been the focus of an Orientalist discourse on Islam that characterizes it as inherently oppressive of women.<sup>3</sup> Even today, outside Muslim communities, discussion of women in Muslim

societies is common shorthand for wider assertions of cultural superiority and the supposed benefits of the liberal Enlightenment.

While An-Na'im focuses on family law in Muslim societies and particularly on its impact on women's human rights, he is neither a fundamentalist nor a liberal. He is part of a long tradition of iconoclastic, questioning, progressive Muslims, both confident in Islam's message of social justice and convinced of the importance of human agency.

Before summarizing the scope, purpose, and content of the book, I would like to clarify my own position. I was closely involved in the 1992-2001 Women and Law in the Muslim World (W&L) action-research Program run by the international solidarity network, Women Living Under Muslim Laws (WLUML). This produced a very different – but possibly complementary – book on a similar topic: *Knowing Our Rights: Women, family, laws and customs in the Muslim World* (2003). My evaluation of An-Na'im's book is therefore bound to reflect commonalities and divergences in the theoretical and practical approaches of these two projects. Meanwhile, I am now on the Advisory Board to the Rights at Home project, the follow-up to the "Islamic Family Law: Possibilities of Reform through Internal Initiatives" project from which An-Na'im's book is derived, and which was until very recently headed by An-Na'im.

The now-increasingly significant body of literature on these topics has to date fallen into five broad categories: anthropological or sociological works (generally based on Ph.D. theses and focusing in depth upon one or two particular countries); theological discussions and (re)interpretations; writings largely grounded in political science and again usually based upon the experience of a limited range of countries/communities; listings of statutory texts with usually perfunctory and/or generally legalistic commentary; and, cross-disciplinary writings which combine a knowledge of jurisprudence, statutory law, and the realities of women's lives – of the 'law in development' or 'women's law' schools. This last category is quantitatively by far the smallest – even if arguably the most relevant to understanding and formulating strategies for strengthening women's human rights in Muslim countries and communities. Rarer still is the sub-category within this of works that move beyond a country-specific or even region-specific focus to encompass the full diversity of Muslim societies and to offer a cross-com-

parative view. An-Na'im's book, as indeed the WLUML book, does precisely this.

Before discussing the theoretical underpinnings of An-Na'im's book reflected in his preface and introductory chapter, I shall first examine the bulk of the work. This is organized into nine parts, each covering a distinct geographical region, with sections on each region's social, cultural and historical background followed by legal profiles of countries in that region. A total of 38 countries are covered, in addition to Central Asia and the Caucasus (which includes Turkey), and southern Africa which are only covered via regional backgrounds. There are contexts such as Fiji and the United Kingdom where, although governed by non-Muslim, 'secular' laws (i.e., generally based on a Christian conceptualization of marriage), Muslim communities may find the courts making allowances for or even reinterpreting Islamic family law in their judgments. A publication aiming to map Muslim family laws globally needs at least to acknowledge such diasporic communities – even if only as a group falling outside the 'mainstream.'

This geographical tour de force reflects much of the diversity of Muslim countries and communities: Where Muslims are the majority and the minority, affected by diverse colonial histories and with differing models of statehood from theocracy to monarchy to democracies which have wavered between military rule and populist elected governments; in some, Islam is the state religion while others have an (increasingly forgotten) history of secularism.

The scope of topics covered is similarly ambitious, offering a history of Islam, political institutions and legal structures in the region, along with a summary about the family, marriage, divorce, polygyny, children, custody of children, and inheritance. Meeting An-Na'im's declared intention of providing a gender-sensitive analysis, each regional profile also examines the issue of seclusion of women (purdah) which is broadened to extend to questions of political and economic participation, education, and an analysis of trends in dress codes. For each country, the legal profile section examines its legal history, the locally predominant schools of Islam (and other religions), the constitutional status of Islam/Islamic law, the court system, 'notable features' (an overview of relevant legislation with some indication of case law trends in depth, varying from half a page to half a dozen pages),

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notes on the local case law reporting system, and an indication of international conventions signed (with relevant reservations). Both the regional background and country legal profiles have accompanying bibliographies and sources.

An-Na'im is aware that the project is ambitious, not least because the law is organic and constantly changing; already commentary regarding Morocco and Iran have been rendered outdated by reform.

It is an extraordinary achievement to have brought all this information under one roof and in a structure that is generally successful: The organization of the material is logical and consistent (even if varying greatly in depth); the size certainly unimposing; and the language refreshingly appropriate for a non-academic audience (if occasionally inconsistent in that in places laws are reproduced verbatim with attendant legalese). If I have one language-related criticism it is that spellings of certain Arabic words such as *shari'a*, *talaq-al-tafwid* or *qadi* have been made uniform rather than used in their local form (*shariat*, *talaq-i-tafweez*, *kazi/qazi*, etc). Is this an inadvertent privileging of Arabic-speaking Muslim communities as more 'authentic' than others? The failure to acknowledge local spellings of common jurisprudential terms is possibly behind An-Na'im's mistakenly separate glossary entries for *khul'* and *khula* (the latter incorrectly conflated with *mubarat*). Meanwhile the publishers, Zed, should simply not have allowed sentences such as "*Hasan 'ala dhikrihi's-salam* announced the *qiyamat*, which means a spiritualization of the *shari'a*" to pass (although none of such sentences detracted from the overall clarity of the book). Inevitable repetition of the specifics of legal provisions in the regional backgrounds and then in the country profiles should equally have been smoothed by a proper copy edit. This is particularly true for a region such as South Asia where a single colonial era law applies across the board with almost insignificant post-independence variations.

I cannot pretend to be sufficiently knowledgeable of the legal systems in all 38 countries covered to discuss the merits – or demerits of all An-Na'im's country legal profiles. I shall, therefore, restrict my analysis to the South Asian section and the legal profiles for Bangladesh, India, Pakistan, and Sri Lanka, presuming that these are repre-

sentative of the overall book (although I suspect less so since An-Na'im's greater knowledge lies in legal systems of the Middle East and parts of Africa). Moreover, whatever criticism follows is to be seen in the context that nowhere else in the existing literature is there such a manageable socio-legal history that covers so many contemporary family laws with an avowed human rights perspective.

But the very scope of An-Na'im's book is bound too to be the source of its weaknesses. It is all but impossible to produce such a work that is error-free. Indeed, recognizing this, An-Na'im notes that "all the information contained in this book was first presented on a website ([www.law.emory.edu/ifl](http://www.law.emory.edu/ifl)) for nearly two years with emphatic invitation and appeal to all concerned to correct our factual assertions and/or challenge analysis." (p. xiii) That the project did not receive a single response means the blame for factual error must at least be shared.

Examples of errors include the assertion that Pakistan's 'Islamization' laws decreed that in compensation (*dijat*) cases the value of a woman's life was to be half that of a man's (p.205). This assertion was indeed common among local women's rights groups but was an activist slogan rather than a reflection of the actual law. Other examples include the statement that Pakistan became independent in 1948 (p.205) (it was 1947), and that 'Bangladesh's Muslim Family Laws Ordinance' was passed in 1962 (p.210) (the Ordinance was promulgated in 1961 and when Bangladesh was still part of Pakistan).

Of greater concern is the possibility that very different people or sources of information were used for the regional background and the country profiles. In certain

instances there are contradictions between information presented on the same topic in these two separate sections. For example, the regional background claims that women in Bangladesh can only seek divorce on the grounds of polygyny, and this too only if the husband remarries without permission from his existing wife and the local authorities. (p. 210) Yet the country profile makes clear that multiple grounds for dissolution of marriage are available to Bangladeshi women and that it is the local authorities' permission (not the existing wife's permission) that is required for a polygynous marriage. Similarly, the regional profile asserts Bangladesh's consti-

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tution is 'avowedly secular,' (p.206) while the country profile correctly notes that the secular principle was dropped in 1977.

Is the problem possibly that, certainly in the case of South Asia, there is a tendency to use academic, non-practicing lawyer sources that are largely based outside the region? Or is this merely pique on my part because, for example, none of the Pakistan Women and Law Country Project materials (three internationally recognized publications on laws, case law and customs by 1998) seem to have been consulted?

The scope of An-Na'im's book also does not leave room for a more nuanced understanding (particularly class, age, and ethnicity differentiated analysis) of, for example, female infanticide or the treatment of divorced women. We are left, therefore, with frustratingly broad assertions such as "divorced women are stigmatized and face a difficult time socially and economically in Pakistan." (p.209) Surely this is true for Christian women in the United Kingdom while overlooking the fact that among the Sindhi peasantry divorce is not particularly stigmatized.<sup>4</sup> It is possibly in the area of custom – rather than statutory law – that this book is at its weakest. But researching and reporting custom is notoriously complex; custom can differ widely according to a long list of variables and even within the same village numerous different practices may co-exist.

While in the area of statutory law, the book offers useful summaries of family law provisions for most countries, overall there are few case law citations (too many would become indigestible). Thus pointers are missing to the contentious family law issues in any given country. Perhaps more importantly, there is little sense of the very significant distinction between text and implementation. This is the crevice through which women's rights most often slip – either because under the influence of social mores and/or political trends the courts do not apply the law within a rights-based framework, or because procedural law works counter to the rights established under family law. For example, An-Na'im notes that Sri Lankan Quazis have 'exclusive jurisdiction over the adjudication of maintenance claims' but fails to point out that Quazis have no powers of enforcement and a woman has to apply to the ordinary courts for enforcement of a maintenance decree, leaving her running between the two forums.

But the gap between text and implementation does not

always work to women's disadvantage. Wherever possible An-Na'im has clearly attempted to provide a sense of how legal practice is continuously evolving. Sadly he has, at least in the case of child custody law in Pakistan, missed commenting on hugely positive developments in recent decades where interpretation of the text in case law has all but changed the essential nature of the original law – overwhelmingly to women's (and children's) advantage. To refer, as he does in this section (probably using Pearl and Menski, 1998<sup>5</sup> as sources), to the 'classical Hanafi position' (p.235) is to miss the point entirely.

With these comments in mind, I would be cautious about fully agreeing that An-Na'im has met his stated objective of providing information on specific legal rules and practices in family law. But, as stated earlier, it is probably unfair to judge An-Na'im on the detail he has missed as the book is the acknowledged outcome of a 'global "mapping" survey' and admirably achieves its other objective of providing "an overview of the influence of Islam on the socio-cultural and historical context" across different countries. Where else, for example, would I be able to find a brief, accessible description of the legal history of Tanzania's Muslims and the family law provisions applicable to them? As symbolized by my participation in the Rights at Home follow-up project, An-Na'im's IFL project and WLUML's Women and Law in the Muslim World Program are essentially complementary, as are their publications; where An-Na'im provides a broad and geographical focus, WLUML provides an issue-based, more in-depth examination of fewer countries. Both are needed.

Whatever the strengths and weaknesses of An-Na'im's description and analysis of family laws in Muslim countries and communities, his preface and introductory chapter, "Shari'a and Islamic Family Law: Transition and Transformation," are outstanding. Within days of reading it, I had copied and shared this chapter with the Gender Unit head in a major international human rights organization who was struggling with concepts around *shari'a* and recent developments in Nigeria.

An-Na'im was a student of the great Sudanese Muslim reformer, Mahmoud Mohamed Taha, hanged in 1985 by the Islamist-influenced government. Taha was no wishy-washy liberal reformist but a radical non-conformist and An-Na'im's progressive apprenticeship shines through his introduction.

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He notes at the very outset that the shari'a is not monolithic. There are significant theological, legal and other differences among and within Muslim societies, and its application is modified by customary practices and state policy. His neat history of *shari'a* talks of 'surviving' schools and the 'total extinction' of some, both indicating that *shari'a* has always been internally contested. Even among progressive scholars there are differences over the meaning of *shari'a*: Some such as Riffat Hassan (1994) contend that the *shari'a* is not divine while some such as Ziba Mir-Hosseini (1999) distinguish between *shari'a* and *fiqh*, regarding the former as divine and the latter human.<sup>6</sup> Given that all hinges on what precisely is included in *shari'a*, An-Na'im's introduction would have benefited from a clear definition. This is only obliquely offered towards its conclusion: 'a moral code for the individual's relationship with God,' (p.18) meaning An-Na'im falls into the latter category; in his view the more limited understanding of *shari'a* is a recent phenomenon, emerging in the colonial period. Refreshingly, his analysis does not limit to colonialism the origins of parallel judicial systems in Muslim countries and their 'division of responsibility' between religious courts for family law matters and secular courts for matters other than personal status law.

An-Na'im insists that family laws in Muslim countries are not shari'a but state law, and like all other law, derive authority from the political will of the state. This also contests analysis of family law as supposedly relegated to a 'private' issue. He is angered that the post-independence elites in Muslim societies sacrificed women's human rights for the sake of political expediency but notes that while gender is a new element, the political manipulation of religious legitimacy has been around since the beginning of Muslim history.

Unlike the Islamists who may also contend that current family laws are not *shari'a*, An-Na'im is categorical that *shari'a* has never been and should never be the basis of family laws for Muslims. This is where An-Na'im is at his very best. He counters the Islamists' claim that application of *shari'a* as a systematic normative order is somehow an inescapable requirement for a pious Muslim community. As he points out, *shari'a* in this form did not develop until some 150-250 years after the Prophet's death and was therefore not applied by the early generations of Muslims – who are usually taken to have been more devout than later Muslims. An-Na'im further contends that even in the supposed pre-colonial Golden Age, the practical application of *shari'a* has been grossly exaggerated. It is impractical to enforce *shari'a* as state law because it does not provide all the tools and materials for a comprehensive and sustainable practical legal system, particularly given the major theoretical problems and differences within and between the

schools. Challenging those who misuse Islam as a political slogan, An-Na'im notes that if countries were to actually live in accordance with *shari'a*, they would have to entirely transform their political boundaries and the nature of government, also living in almost total economic and political isolation from the rest of the world. Iran's current reform movement – supported by many clerics – demonstrates the impracticality of theocracy in the modern world.

An-Na'im is a true secularist, for whom the transcendental essence of *shari'a* is sullied by the very step of enacting it as the positive law of the state. For him, the only means of achieving "equality and fairness for Muslim women within an Islamic perspective, without compromising the religious identity of Islamic societies and personal piety of individual believers" is for human agency to understand the underlying (historically contextualized) rationale and spirit of the Qur'an and Sunnah, and develop equivalent social policy applicable in our modern context. This, he suggests, already exists in the form of universal human rights norms.

Many in Muslim countries and communities might contest the assumption that an 'Islamic perspective' is the preferred perspective and that preservation of religious identity is essential for all. Indeed, in terms of women's access to justice in family law, WLUM's W&L research clearly revealed that it is neither the 'Islamic' nor 'secular' character of a law which makes it less or more option-giving for women. The issue is whether the state and human society root this law and apply it in a human rights framework. Through perhaps very different paths we have come to the same conclusion.

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## Endnotes

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