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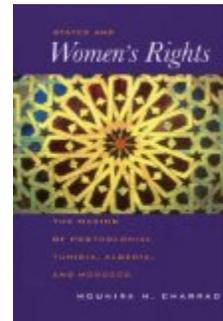
Family Law and the Politics of Nation-Building in the Maghrib

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Now more than ever, the issue of gender equality poses itself as the gauge by which we measure how far into modernity any Maghribi and Middle Eastern state has gone. As the world is more and more interested in the dynamics that shape the political and social conditions of this region, Arab and Muslim scholars have yet to rationally account for the fact that one half of the populations in Arab/Muslim countries (women) do not enjoy the same legal rights as the other half (men). And as we are ushered into the new millennium through a gauntlet of terror and violence, Maghribi and Middle Eastern societies are closely watched for signs that would prove the easily made link between Islam and violence or to justify whole sets of ideas and views that perceive Islam as providing rich soil for all kinds of archaism and extremism.

For the past few years, there has been talk about democratization, free press, and freedom of speech everywhere in the region, and some regimes have made some courageous steps towards that end. However, these societies remain far from partaking in the values of the modern world when it comes to women's rights. Under various pretexts, Islamic law is held hostage to political ends and the intellectual debate is stalled. While some do not seem to understand that the issue is more than just claiming that Islam promotes women's rights, what is actually of crucial importance is not what in theory Islam said about women's rights fourteen hundred years ago but what Muslims do or do not do now. And one important thing that is not always done in this part of the world is reading historically and contextually. Reading historically and contextually means recognizing the entire legislative literature produced by Muslim scholars in the past as a hermeneutic effort made possible by and limited to the historical and social conditions of that period of Islamic history. Implementing rules of social control and state formation that had been devised centuries earlier smacks of archaism and intellectual paralysis. By the end of the colonial rule, and with the exception of Tunisia, the Maghribi family legislations, for instance, claim their conformity to Islamic "principles." However, the way, i.e., the effort of extrapolation involved in establishing them, and the extent to which the Maghribi legal systems match the reality of the world then and even today still remain out of the main debate in the individual countries of the Maghrib. As to whether those principles reflect the true spirit and ideals of that religion, the question remains unvoiced. Principles of Islam are often bandied about unthinkingly and are brandished in the face of everyone who challenges the status quo of the social injustices done to women. Fear that any modernization of the legal system would automatically undermine the power relations in society are evidence enough that what is at stake is actually the stability and longevity of a social order based on what Asma Barlas calls a "patriarchal exegesis" of the Qur'an.

The supposedly frozen meaning of the holy book is a notion that needs to be revisited, for if meaning is histori-

cally and socially constructed, then the heavy reliance on ancient interpretations is at best an anachronism and at worst an injustice done to the religious text itself. There definitely is something wrong with justifying human injustice towards women by referring to interpretations of the Qur'an that date back to the first centuries of Islamic civilization. Muslim scholars bear the moral responsibility for the absence of the necessary and crucial distinction between the Qur'an as sacred text and the *shari'a* as human endeavor to adapt the Qur'an to the historical, social, and cultural specificities of a particular epoch.

Such critical distance vis-=-vis the body of exegetic writings that are inherited from the past only now begin to take place, and it is very significant that most of the critical scholarship on this issue comes from outside the Muslim world and in languages other than Arabic, which actually says a great deal about how much ground Arab and Muslim countries have yet to cover on the way to academic freedom. In this vein, one can mention Asma Barlas's book *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an*, an attempt as the title makes clear to deconstruct the dominantly male interpretation of the holy book with the aim of "recover[ing] the scriptural basis of sexual equality in Islam and thereby to defend Islam" against the claim that it is a religious patriarchy that "professes models of hierarchical relationships and sexual inequality."[1]

On a more specific issue, Mounira Charrad's book opens the vast issue of the use of religion for political ends. Charrad analyses the situation of family law in the three Maghribi states (Tunisia, Algeria, and Morocco) and focuses on how, at independence, women's rights as embodied in family law were sacrificed in the name of national unity in Morocco and were held hostage to political divisions for two decades before being sacrificed to rising fundamentalism in Algeria, while in Tunisia the nationalist elite succeeded in imposing reforms that were revolutionary by regional standards.

The book is an attempt to answer the following core question: what are the structural and historical forces that led the three newly formed states to follow different paths with respect to family law and women's rights? The author's central argument is that the process of state formation, especially the pattern of integration of tribes or tribal kin-groupings in each nation-state, has been critical in shaping the state and its family law policy. Charrad's text is a pluralistic compendium of historical, sociological, and anthropological elaborations of the intricate ties between state formation and family law.

The merit of such an approach is that it removes the issue of women's rights in the Arab world from the purely religious versus feminist, and often sterile, debate and anchors it in the political and historical contexts surrounding independence from colonial rule.

Against models that focus on class conflicts and pressure from social and political movements on states to either expand or limit women's opportunities and rights, Mounira Charrad argues that the tribal mode of sociopolitical organization in the Maghrib is the key element in understanding the issue of family law. The conception of family as an extended male-centered patrilineage finds legitimacy in Islamic law and as such it has served as the building block of kin-based solidarities within tribal groups in the Maghrib. In designing a framework that focuses on the relations between state and tribe in the process of state construction, the book shows how developments in the North-African states does not conform to the prevailing model of the forces shaping state policies on gender. Pressure from below by social and political movements including women's movements, women's rights advocates, etc. have been non-existent or very limited in that region. Whatever reforms have taken place had been imposed from above, i.e., by the political elite that took power after independence.

However, the three countries have gone about devising their respective family law in particular ways and with identical results for Morocco and Algeria, while Tunisia chose the path of modernization. Historical, social, and political conditions account for such a state of affairs. Central to this are the weakness of central authority and the enduring tension that has historically characterized relations between center and periphery in the Maghrib, and which finds its best description in the phrase *bilad al-makhzan* (land of government) versus *bilad al-siba* (land of dissidence). As the Maghrib (with the relative exception of Tunisia) did not experience stable centralized states in the pre-colonial period, the tribe as the basic community is the key feature of the political and social structure. The history of tension between a social group holding power in the political center and autonomous local collectivities resisting its control made tribes coexist with partially bureaucratic centers that had shifting boundaries and often lacked stable systems of administration at the regional and local level. The colonial rule adapted its strategies of domination to the socio-political situation in each country of the region. In Tunisia, France furthered bureaucratic centralization, weakened the tribes, and generated a laissez-faire policy on family law while in the other two countries it main-

tained kin-based segmentation and politicized family law by implementing customary law and emphasizing existing divisions among regions.

After independence each country followed its own path with respect to family law. In Morocco, both the monarchy and tribal organizations came out of the colonial experience strengthened and in powerful positions to negotiate the type of social control the new state would exercise. In a context of shifting alliances and political volatility, the central authority chose to adopt a "code of personal status" that preserved the interests of the male-dominated tribal structure. The code conforms to the predominant Maliki school of Islamic law which has been historically best adapted to the social structure of Maghribi societies in that it fit the extended patrilineage. The thrust of the Maliki school of law is to permit the control of women by their male relatives and to preserve the cohesiveness of patrilieages. The subordinate status of women constitutes one of the most apparent and distinctive themes in the legal texts that show how the law places women in an inferior position and gives men power over them. Thus the *Mudawana* (the code of personal status) that defines family law in Morocco, adheres to such a position through a whole set of laws that give men great power with respect to marriage, polygamy, divorce, repudiation, inheritance, and custody. In Algeria, the political and regional divisions that the war of independence kept hidden, mainly because of the decentralized resistance and lack of communication, sprung into daylight with the advent of independence. The FLN evolving single-party rule dictating what form of social organization was to be implemented failed to surpass its divisions.

As a result *Le code de la famille* (the code of family law) was subject to an irregular debate that lasted for two decades before being imposed in a similar form to the Moroccan code of personal status. Both are the outcome of a reactionary politics that sought the preservation of public order and the traditional social structure of society through the marginalization of women. The most progressive and modernity-oriented family law is the one adopted by the Tunisian leadership. While in Morocco and Algeria family law was based on a conception of family as an extended male-dominated 'a'ila, the Tunisian Majalla (the Code of Personal Status) sanctioned essentially a nuclear model of the family and expanded women's rights. Due to its victory in the struggle for independence, the nationalist leadership in Tunisia imposed laws that best translated its vision of a modern state. The promulgation of the Code of personal status profoundly changed family law and the legal status of women. It thus altered regulations on marriage, divorce, alimony, custody, adoption, filiation, and inheritance. The code was made even more fair towards women through many revisions and measures such as giving priority in inheritance to children (males or females) over other kin even if they were males. The code also outlawed polygamy, allowed women to file for divorce on the same grounds as men, gave the mother the same custody rights as the father, and placed men and women on the same footing in regard to adultery which, whether committed by husband or wife, came to be regarded as an offense punishable by a fine and imprisonment. All these changes, as the author says, go counter to the conceptions of family, divorce marriage inheritance, etc.–characteristic of Maliki law. However, while these drastic innovations put Tunisia at the forefront of newly independent and modern states, they failed in promoting democracy in the country. Like its western neighbor, Algeria, single-party rule dominated the political scene for decades resulting in political authoritarianism.

In the three independent states, the reasons for the difference in family law policies "lie neither in the ideology of the nationalists nor in pressures from below, but instead in struggles for state power and in state-building strategies. What made the most important difference was neither the history of family law itself nor the history of opinions about the law, but the history of politics" (p. 238).

Note

[1]. Asma Barlas, *"Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an* (University of Texas Press, 2002), p. 203.

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