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Family Law Reform and the Feminist Debate: Actually-Existing Islamic Feminism in the Maghreb and Malaysia

By Brad Archer¹

Abstract

For an increasing number of Muslim women and women's rights activists, the stark disparity between the principles of justice and equality guaranteed by international and domestic legal norms on the one hand, and the oppressive environment of their homes that is legitimated by repressive family laws on the other, has acted as the catalyst for a unified call for reform. In the Maghreb, an influential Islamic feminist movement has successfully lobbied for family law reform, and this movement's positivist framework has recently been adopted as the model for Malaysia's increasingly vociferous demands for gender equality. Although secular feminists in the West frequently criticize the aims of this Islamic feminism as an oxymoronic anti-feminism, the Maghreby movement serves as proof that only an Islamic feminist reform model can serve as a pragmatic challenge to discriminatory laws.

Keywords: Muslim women, Islamic feminism, family law reform, Maghreby movement

Introduction

For an increasing number of Muslim women and women's rights activists, the stark disparity between the principles of justice and equality guaranteed by international and domestic legal norms on the one hand, and the oppressive environment of their homes that is legitimated by repressive family laws on the other, has acted as the catalyst for a unified call for reform. In the Maghreb nations of North Africa, an influential Islamic feminist movement has successfully lobbied for family law reform, and this movement's positivist legal framework has recently been adopted as the model for Malaysia's increasingly vociferous demands for gender equality. Although secular feminists in the West frequently criticize the aims of this Islamic feminism as an oxymoronic anti-feminism, the Maghreby movement serves as proof that an Islamic feminist reform model can serve as a viable and pragmatic challenge to discriminatory laws.

In spite of the coercive efforts of the forces of colonization and globalization, which have sought to modernize and secularize developing nations, states throughout the Muslim world have maintained their allegiance to traditional Shari'a law. Many polities heavily influenced by Islamic traditions have developed a dual system of governance that supports the liberal ideals of democracy and egalitarianism within the public sphere of civil society while simultaneously institutionalizing the subordination of women in the private sphere of their homes via discriminatory, Shari'a-infused family laws (Collectif 95 Maghreb-Egalite [Collectif 95], 2005, p. 17). These laws continue to stifle the agency

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of millions of women by restricting their participation within what is considered by observant Muslims to be the foundation of Islamic society: the family unit. This repression has given rise to a growing movement of Maghreby Islamic feminists that has, over the past decade, successfully couched their demands for family law reform within the context of their religion.

Both fundamentalist Muslims and secular feminists have attacked this reform-minded brand of Islamic feminism,² which seeks to utilize the egalitarian tenets of Islam as a basis upon which to expose and undermine the unjust nature of misogynistic family laws. While the former view Islamic feminism as a threat to traditional values and beliefs (Fong, 2006), the latter see it as an apologist philosophy that serves to undermine the liberal goals of secular feminism while legitimating an inherently unjust religion (Mojab, 2001, pp. 130-131). Although the critical feminist critique does present a compelling interrogation of the merits of Islamic feminism *qua* social theory, it fails to appreciate the very real gains currently being made by Muslim women using Islamic feminism as a framework for grassroots activism. Thus, the aim of this paper is to demonstrate that while some of the current critiques espoused by secular feminists do serve as reasonable challenges to Islamic feminism, the facts on the ground demonstrate that Islamic feminism, as it has emerged in the Maghreb, is nonetheless promulgating genuine family law reform.

The first section of this article presents a sampling of the current line of critical feminist critique aimed at Islamic feminism. As such, the arguments of Haideh Moghissi and Shahrzad Mojab provide examples of the secular feminist voices informing the ongoing debate *vis-à-vis* the proper role feminism ought to play in combating gendered discrimination and oppression in the Muslim world. This paper then provides a comparative outline of the historical contexts out of which the current Maghreby model of family law reform has emerged, while examining the evolution of family laws in the former French colonies of Tunisia, Morocco and Algeria. The following section presents an analysis of recent family law reform in this region, paying special attention to the contributions of the Collectif 95 Maghreb Egalite (Collectif), the Maghreby women's advocacy group whose *One Hundred Measures and Provisions for an Egalitarian Codification of the Personal Status Codes and Family Law in the Maghreb (One Hundred Measures)* laid the foundation for this successful reform movement. This paper then suggests the transnational viability of this women's rights framework by examining its adoption by Malaysian family law reformers.

Secular Feminist Critiques of Islamic Feminism

For secular feminists like Moghissi and Mojab, the very idea of Islamic feminism demonstrates a "contradiction in terms" (Mojab, 2001, p. 131). These critics direct much of their indictment of Islamic feminism at those writers living in the West, who the former view as being detached from the real needs of women living in societies heavily influenced by Islamic norms. For Moghissi and Mojab, because Islamic feminists seek to

² For the purpose of this paper, "Islamic feminism" will refer only to the reformist model that seeks to engender progressive change, as opposed to another prominent fundamentalist brand of Islamic feminism, the supporters of which seek a return to more traditional mores and values. For more on this distinction, see Shahrzad Mojab, "Theorizing the Politics of 'Islamic Feminism,'" Winter 2001, *Feminist Review*, No. 69, pp. 124-146.

promote reform from within the strictures of what they view to be a misogynistic and discriminatory religious framework, they cannot hope to present a real challenge to the dominant patriarchal political, social and cultural systems (Mojab, 2001). In fact, as a result of their uncritical embrace of religiosity, Islamic feminists serve to prop up the very systems that oppress Muslim women.

In Moghissi's *Feminism and Islamic Fundamentalism: The Limits of Postmodern Analysis* (Moghissi, 1999), the author set out to shed light on what she viewed as a disturbing trend in academic circles: the idealization of women's capacity for agency in fundamentalist Islamic societies. According to Moghissi, many Islamic feminist scholars actively downplay what ought to be considered serious violations of the rights and dignity of Muslim women in an attempt to reduce the backlash of "Islamophobia" being experienced by Muslims living in the West, and in so doing "...call attention to the 'brighter sides' for women of Islamification, seeking acceptance of degrading practices as simply a 'different way of life'" (Moghissi, 1999, p. 46). This trend of legitimating practices that serve to reinforce patriarchal norms has been demonstrated repeatedly in the works of Laila Ahmed and Saba Mahmood, both of whom have sought to present the practice of veiling as a mechanism of women's empowerment, rather than as a tool of patriarchal subordination.³

That is not to say that Muslim women who have donned the veil or have otherwise sought out a personal level of religious piety or political activism cannot have done so on their own accord. To be sure, Ahmed and others have provided ample evidence that women in Egypt and Iran have embraced Islamism as an exercise of their agency, rather than as a means of complying with the demands of patriarchy. However, what many of these writers do overlook is that in some Muslim-dominated societies, "the 'choice' for women is between wearing a veil or not staying alive" (Moghissi, 1999, p. 43). Thus, in legitimating such traditions steeped in patriarchal views on modesty and chastity, some Islamic feminists ignore the very real suffering experienced by Muslim women whose agency is genuinely stifled by oppressive norms and practices.

In writing about the failings of Islamic feminism in Iran, Mojab repeats Hammed Shahidian's claim that because the movement seeks only to make patriarchy more palatable, rather than abolishing it completely, it has become an "oxymoron" (Mojab, 2001, p. 131). "Thus," according to Mojab, "far from being an alternative to secular, radical and socialist feminisms, 'Islamic feminism' justifies unequal gender relations" (Mojab, 2001). And theoretically, from a secular feminist perspective, this argument rings true: attempts at reforming family laws anywhere in Islamic societies can never be a truly feminist endeavor, seeing how any legal changes would occur within a politico-socio-religious system in which men wield ultimate control. However, this problem is not exclusive to Islamic societies; to be sure, secular feminists have long called for the replacement of *all* systems informed by patriarchal domination by systems that engender equality (Tong, 2003).

For both Moghissi and Mojab, there seems to be little, if any, middle ground in the debate between secular feminism and Islamic feminism. In fact Mojab, echoing the polarizing "You're either with us or against us" posturing of President George W. Bush's

³ See Laila Ahmed, "The Veil Debate-Again," and Saba Mahmood, "Feminist Theory, Agency, and the Liberatory Subject," both in Feresheth Nouraie-Simone, ed., *On Shifting Ground: Muslim Women in the Global Era*, The City University of New York Feminist Press 2005.

war on terror, states that because “[v]iolence against women is rampant throughout the Islamic world,” we must ask “Which side are you on?” (Mojab, 2001). This seems to imply that those who support the Islamic feminist ideal of reforming oppressive social, cultural and religious norms from within the framework of Islam must be on the “side” of violence against women.

At this point, one must ask two questions. First, does this “us versus them” rhetoric constructively address issues involving the treatment of Muslim women? In pitting secular feminism against Islamic feminism, critics representing the former vein stifle any potential for discourse and cooperation between the two camps. Furthermore, by painting such complex gender issues in black and white, writers like Moghissi and Mojab ignore the fact that there are a variety of voices, aims and practices that make up the reformist Islamic feminist movement. And these varied projects share a common goal—the diminution of the suffering experienced by millions of women living under repressive norms. The achievement of this basic and urgent goal would be better well-served if secular feminists would seek ways to work with, rather than disparage, Islamic feminists.

The other important question that ought to be posed to these critical secular feminists is whether they have a viable alternative to Islamic feminism that would serve as a framework within which reform could be engendered within Islamic societies. If their true aim is to “launch a revolutionary war against [Islam]” (Al-Faruqi, 2000, p. 73) in an attempt to give rise to the liberal ideals of democracy and egalitarianism, one must challenge such a plan as lofty idealism at best, or audacious cultural imperialism at its worst. I suspect, however, that these secular feminists prefer to present their theories and proposed projects solely within the pages of academic journals and in scholarly debates. While theoretically much of the invective aimed at Islamic feminism might be reasonable from a secular feminist perspective, the fact remains that as the debate rages on, countless Muslim women continue to live under stifling patriarchal laws and customs. Thus, the supercilious ideals espoused by secular feminists like Moghissi and Mojab are simply ineffective in addressing the grave situation faced by many Muslim women, while the grassroots movement emerging from the Maghreb has provided a platform for significant reform.

The Evolution of Maghreby Family Law

Because the ideals of secular feminism will not likely ever completely displace patriarchal systems of subordination, we ought to look elsewhere for a pragmatic approach aimed at easing the suffering of women while providing greater opportunities for women’s agency to flourish. In recent years, a women’s rights movement based in part upon the principles of Islamic feminism has emerged in the Maghreb, and it has effected dramatic and positive change in the area of family law. This model of reform just may be the catalyst for a sweeping dissemination of women’s rights norms.

An examination of family law provides much insight into how a given society treats its female citizens. In particular, the body of Islamic family law acts as a gauge by which we may determine the degree to which women living under Islamic norms have attained genuine equality. Because these family laws define such aspects of women’s lives as the proper age of marriage, their obligation to obey their husbands, and their ability to divorce, these norms are of paramount importance to those hoping to ensure the

protection of women's rights. Throughout much of the Muslim world in recent years there has developed a dualism between the "public" political rights women are guaranteed under domestic law and the restrictions placed on their "private" home lives by a separate code of family laws (Collectif 95, 2005, p. 17). In societies wherein repressive family laws continue to trump the "public" rights protected by state statutes, women cannot hope to realize any real degree of equality or security.

Aside from the system of rights and obligations imposed by Islamic family law, these norms also act as a central defining characteristic of Muslim self-awareness.

Being the main aspect of Shari'a that has successfully resisted displacement by European codes during the colonial period, and survived various degrees or forms of secularization of the state and its institutions in many Islamic countries, [family law] has become for most Muslims the symbol of their Islamic identity, the hard irreducible core of what it means to be a Muslim today ("Islamic Family Law").

Viewed in this light, one can better understand why an Islamic feminism ought to be accepted as a legitimate and effective movement for change, for this ideology expressly acknowledges that for many Muslim women, their self-identity as believers precedes their gendered identification. Secular feminisms largely ignore this distinction, and seek to define all women primarily in terms of their gender, often at the expense of one's religious identity (Al-Faruqi, 2000, p. 74). The women of the Maghreby family law reform movement have developed a platform predicated upon the appreciation of Muslim identity, and have thus been able to effect significant social and political change.

Although the Maghreby nations of Tunisia, Morocco and Algeria share similar historical and cultural backgrounds, their comparative women's rights paradigms have evolved along quite different paths. Whereas Tunisia embraced many progressive legal reforms upon its independence from France in 1956 and Morocco's monarch has in recent years instituted significant family law reform, Algeria has held fast to many inegalitarian and repressive family laws. The following outline of the post-colonial histories of these three nations aims to clarify the historical context from which today's prominent Maghreby model of family law reform has emerged.

Tunisia declared its independence from France in 1956, following nearly eight decades of colonial rule. Habib Bourguiba, the leader of the nation's successful struggle for autonomy, emerged as the new republic's first president. Bourguiba immediately set out to modernize Tunisia, and understood that a key to realizing this goal was the adoption of democratic legal reform. Central to this sweeping reform movement was the enactment of the progressive Personal Status Code. This codification of family law served as a radical departure from the traditional, Shari'a-influenced norms, as it *inter alia* criminalized polygamy and established strict and egalitarian guidelines on divorce, thus ending the customary practice of informal marital repudiation that gave men virtually absolute control in setting the terms of a marriage. For a time this divorce law was more liberal than that of the United States, which did not see its first "no-fault" divorce statutes until 1969 (Mayer, 1995, pp. 433-434).

Although this transition was indeed a drastic departure from the conservative Shari'a, it was not a wholly secular movement. Considering that Bourguiba was himself

a Muslim, he ought to be viewed as a pragmatist rather than a radical iconoclast (“Habib Bourguiba,” 2000). As such, Bourguiba sought to create a family law flexible enough to meet the needs of *all* Tunisians, Muslims and non-Muslims alike. In so doing, he utilized a liberal interpretation of the Qur’an that promotes equality and views the practice of polygamy as an irrelevant anachronism (Panbianco, 2004). Tunisia’s Personal Status Code remains the most progressive body of family laws in the Maghreb and many of its principles set the standard for Islamic feminists currently pushing for further Maghreby family law reform. That said, Tunisia is not a wholly egalitarian state today, as its women still face *de jure* discrimination in the form of inheritance laws that grant men twice the amount of remuneration allowed to women (Collectif 95, 2005, p. 131).

While the evolution of Morocco’s family law was not as rapid as that of Tunisia’s, the former has in recent years seen radical changes in the status of women’s rights. Like Tunisia, Morocco gained its independence from France in 1956. However, the two nations pursued divergent paths as they developed women’s rights norms. Seeking to demonstrate its newfound independence from French influence, Morocco reaffirmed the primacy of many legal principles established centuries before within the Maliki school of Shari’a exegesis. As part of this return to conservative, traditional legal norms, Morocco codified its family laws within the *Moudawana* (Mayer, 1995, p. 434). This new body of family law superseded Morocco’s constitutional guarantees of equality and effectively relegated women to the status of “adult minors,” (Pitman, 2004, p. 4) wholly dependent upon their male guardians and/or husbands for guidance and approbation.

Among the most discriminatory and harmful aspects of the Moroccan *Moudawana* were the rules setting the standards for marriage age and those conferring the marital obligation of “obedience” upon women. Under the established family law, girls as young as 15 could be coerced into unattractive marriage arrangements by a *wali*, or matrimonial guardian. Likewise, women well into adulthood found their marriage plans being dictated by male mediators (Collectif 95, 2005, pp. 48-49). Once married, women found themselves bound by an institutionalized mandate to defer to and obey their husbands. Too often, husbands posited this Shari’a-based obligation as divine justification for abusing their wives. This trend was evinced by a 2000 survey conducted by the *Association Democratique des Femmes du Maroc* (ADFM), wherein 70% of the male respondents viewed physical abuse as a legitimate means of resolving domestic conflicts (Collectif 95, 2005, p. 76).

Signs of family law reform surfaced in Morocco shortly following the crowning of King Mohammed VI in 1999. Following nearly a decade of grass-roots, rights-based activism that included a massive 2001 march against violence and poverty, the new king signaled his intent to pay heed to the demands of reformists by organizing a meeting with leading women’s rights activists. This meeting resulted in an agreement by the government to consider reforming the *Moudawana* (Pitman, 2004, p. 4).

The next three years saw intense debate and lobbying by women’s rights organizations. Much of the discourse was informed by a progressive Qur’anic interpretation that emphasized gender equality and domestic harmony. In February 2004, King Mohammed IV enacted Morocco’s new family law. In a previous statement promoting the law, the king invoked Islamic principles as codified in the Qur’an as a means of affirming the legitimacy of the call for reform (Radu, 2003).

The new body of law instituted several significant changes, including the raising of the marriageable age of women to 18 and the abolishment of the obligation of obedience. This latter reform is ironic when we consider that the American Southern Baptist Convention recently reaffirmed the inviolability of the Biblical mandate calling on women to submit to their husbands in all domestic matters (Moghadam, 2002, p. 1160). Although polygamy is still legal under the new law, its practice is greatly restricted by a set of conditions so rigorous as to render it virtually unfeasible. This religion-inspired reform movement demonstrates that positive change can result from an Islamic feminist framework that seeks to engender greater equality through the use of religious principles.

In contrast to the relatively smooth road to independence experienced by Tunisia and Morocco, Algeria faced 8 years of brutal internecine warfare against their French occupiers. When the smoke cleared and Algeria declared its independence in 1962, the new republican government estimated its dead at nearly one million ("Algerian War of Independence," 2003). The 1990s saw even more carnage as Algeria suffered nearly a decade of terrorist attacks by Islamic militants and civil conflict that killed upwards of 150,000 persons and resulted in the empowerment of a strong-arm military cadre that still wields great political influence today ("Algeria Politics," 2003). While terrorist attacks and civil unrest have decreased substantially in recent years, the government nonetheless noted that 17, 200 persons were reported "missing or disappeared" in 2004, nearly half of whom went missing due to government actions ("Algeria: Country Reports," 2005). This ongoing climate of violent unrest and the influence of fundamentalist Islamists have stifled any significant reform of the nation's 1984 Family Code. This set of family laws, like Morocco's *Moudawana*, institutionalizes discrimination against women thus reinforces their subordination within the home.

The women's rights group Women Living Under Muslim Laws has identified several aspects of the Algerian family law that require immediate reform. Under the current statutes, *walis* continue to dictate the terms of many matrimonial agreements by passing judgment on the suitability of a prospective husband, thus rendering impotent a woman's agency in choosing her mate. While a woman's right to divorce remains subject to a series of qualifications, men have retained an absolute right to unilateral repudiation, or *talaq* ("Algeria: Statement from the Collectif," 2004). Other restrictions, such as that prohibiting women from marrying non-Muslims, serve to undermine women's autonomy and thus reinforce the view of women as perpetual minors incapable of making intimate decisions for themselves. Such perceptions engender a climate of violent subordination wherein abuse is rampant. While half of Algerian men recently surveyed viewed beating their wives as a legitimate demonstration of their "undisputed power," (Collectif 95, 2005, p. 76), social pressures and unjust laws placing the burden of proof upon the victim deter women from seeking redress, and an estimated 70% of female victims of domestic violence fail to lodge a formal complaint ("Algeria: Country Reports," 2005).

While women's rights groups such as the Association for the Promotion of Women's Rights (APDF) and the Independent Association for the Victory of Women's Rights (AITFD) have framed their calls for family law reform within an Islam-informed movement, the Algerian government continues to kow tow to the vociferous threats from fundamentalist Islamists, and has thus been hesitant to take any decisive action.

Although the government recently approved some amendments to the 1984 Family Code, many women's rights activists view these changes as piecemeal and ineffectual reforms ("Algeria: Statement from the Collectif," 2004). Unfortunately, as long as Algeria faces domestic terrorist threats and a repressive government, significant reform is unlikely.

Collectif 95 Maghreb-Egalite and Reform

For over a decade, the Collectif has been a leading voice in the movement for family law reform. In the early 1990s, this umbrella organization brought together some of the most respected Maghreby women's rights activists in order to produce a unified call for legal reform. The group subsequently produced the *One Hundred Measures*, a comprehensive challenge to the discriminatory family laws in Tunisia, Morocco and Algeria. This positivist document is unique in that it combines the Qur'anic ideals of equality and justice with secular domestic and international legal norms in order to create a holistic and complete argument for family law reform.

In her critique of Islamic feminism, Mojab claims that "the project of Islamic feminists is extremely limited in both theory and practice," and that "it lacks a theoretical framework of rights and law" (Mojab, 2001, p. 139). However, an examination of the texts at the center of the family law debate and Morocco's subsequent acceptance of key Islamic feminist principles wholly dispels these claims. The Collectif's *One Hundred Measures* and its more recent contribution to the family law reform movement, the *Guide to Equality in the Family in the Maghreb (Guide to Equality)* contain cogent arguments for change. In framing its call for reform, the Collectif posits arguments based upon four sources of authority: Qur'anic principles; national constitutional law; international human rights law, and sociological studies investigating interactions within Maghreby families (Collectif 95, 2005, p. 9). By combining religious mandates with secular law, the Collectif has produced a formidable argument for family law reform.

Not only is this reform model theoretically sound, it has also been demonstrated to be an efficacious instrument of change. Morocco's parliament and King Muhammed IV relied heavily upon the *One Hundred Measures* and the *Guide to Equality* as they met to discuss potential family law reforms, and the resulting family law cites the multi-faceted framework outlined in these texts as the basis of its authoritativeness. In Algeria, this model has stimulated dialogue among the *ulema*, or Islamic scholars, who are currently considering amending the nation's statutes. Some of these men are now openly questioning the divinity of Shari'a law, creating the possibility for a progressive Qur'anic exegesis to replace the traditional, conservative one (Naciri, 2005). Thus, these successful efforts of the Collectif demonstrate that an Islamic feminist voice is a much-needed and powerful agent of change in the ongoing debate on family law reform.

The Malaysian women's rights movement has recently embraced the Maghreby model of family law reform, demonstrating that this framework can be adapted to cultural contexts quite different from that of North Africa. Finding inspiration in Morocco's successful legal transformation, the women's rights group Sisters in Islam (SIS) has tailored the *Guide to Equality* to address the specific needs of Malaysian women (Anwar, 2005).

Zainah Anwar, executive director of SIS, has noted that the movement for reform has met with significant success as it struggles to overturn discriminatory family laws. Following discussions between SIS and government officials, Prime Minister Datuk Seri Abdullah Ahmad Badawi agreed to consider amending the controversial 2005 Islamic Family Law.

Of primary concern of women's rights activists are amendments both making polygamy more accessible to men and allowing men to use the property of their primary wives to support the new wives. As an immediate compromise intended to ease the concerns of activists while the Badawai government considers revising these amendments, several prejudicial inconsistencies within the existing statute have been addressed, and Anwar expressed her belief that the changes will serve to "minimise any injustice" ("SIS: Most Problems in Islamic Family Law Clarified," 2006.)

While it is true that the theoretical critiques of Islamic feminism espoused by secular feminists are often soundly-reasoned and cogently articulated, this discourse fails to provide an actionable call for reforming the systems of subordination faced by many of the world's women. For the millions of women currently living under discriminatory Islamic family laws only resolute activism, not elitist censure, will alleviate their suffering. A central weakness of the arguments made by secular feminists like Mojab and Moghissi who favor radical institutional reform is that they encourage the rejection of what for many Muslim women forms the core of their self-identity—their faith (Al-Faruqi, 2000, p. 73). Thus for many Muslims, the secular feminist call for reform presents a threat to women's agency and identity no less repugnant than that posed by unjust and repressive family laws.

The Islamic feminist model of reform developed by the Maghreby feminists is responsible for stimulating significant family law reform. The transformation undergone in Morocco demonstrates that calls for change based upon Islamic principles can act as highly effective agents of change. While Algeria has not embraced such radical reform, the Maghreby movement has at least encouraged the *ulema* there to open the doors of debate, and such discourse is the catalyst of reform. And seeing how Malaysian Islamic feminists are currently using the Maghreby framework engenders hope that this model can be adapted to other Muslim nations wherein calls for abolishing anachronistic family laws are growing. By serving as a bridge between Islamic tradition and the demands of modern life, Islamic feminism provides a pragmatic framework for the reform that is so urgently needed.

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