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Personal Status Law, Modernity, and Women in Tunisia and Algeria

I - Introduction

In the decades since many North African and Middle Eastern countries have gained independence from colonial regimes, the post-colonial paradigm has often been dominated by the debate between tradition and modernity. These debates, on one side, assume modernity as a notion rooted in western centric assumptions built on foreign historical foundations. Tradition, on the other hand, is not based on pre-colonial conceptions of law and society. Rather, the conceptions of law and society are based on the manipulation of politics and power by elites in the colonial era that fundamentally changed the conceptualization and implementation of tradition. That said, when looking at modern Muslim states, the debate between modernism and traditionalism is less a debate between the west and Islam, but rather a debate on how Muslim states have developed in the post-colonial age based on historic notions of identity and stability created during colonial occupation,

Within these debates, personal status and family codes have become focal points due to their apparent instrumental ineffectiveness during the colonial period. Even as all other legal and political aspects of life changed, these laws were often left alone to be governed by traditional Islamic regulations. Laws and traditions governing personal status became focal points for the identity of many Muslim citizens as the only sector of society untouched by colonial domination.

As Muslim states gained independence throughout the twentieth century, these laws became representations of how states and societies progressed into the independence era. The varying factors of political stability, relevance of identity politics, and colonial era policy created numerous paradigms for the ability of states to respond to the debate between modernity and traditionalism, and how this debate manifests in personal status code. Tunisia and Algeria, as two states where this debate has manifested in drastically different ways, are two prime case studies as to how post-colonial policy has manifested from historical foundation. Family law—and in turn, many laws governing the conduct of women—in these states was formulated based on the new political leadership of the countries, the relationship with the colonial past, and national considerations of concepts of modernism, historically rooted in western ideology, and traditionalism, rooted in the idealization of the precolonial period.

II - Family and Personal Status Law in the Colonial Era

Throughout the colonial period, as European empires increasingly established social, political, and legal dominance over the existing structures of the colony, traditional Islamic law was often relegated to the area of family and personal status laws—laws that would be ineffective for colonial administrations to establish further dominance in the legal system. Until this point, the socioeconomic and political system regulated by shari'a dominated all areas of society. Colonial domination over legal and social systems relied on the structural dismantling of the shari'a system (Hallaq, 2012). Thus, as traditional practices were transformed into colonial-era manifestations of European interpretations of Islam and European tradition, family law became a sacred realm of legal and social structure because of its separation from the destructive nature of colonialism on all other areas of society. These laws were, in effect, useless as tools of

domination by the colonial system. At the same time however, the very fact that they were ineffective was used to the advantage of colonial and local elites—the continuance of these laws was promoted as a sign of sensitivity and respect from colonial powers over sacred domains of Muslim life (Hallaq, 2012). Once these laws were culturally marked as sacred, they became the central point of identity for many colonized citizens, and, as markers of identity unadulterated by colonialism, a belief was propagated that any infringement on these law would lead to social disorder.

Thus, maintaining the practices put forward in personal status codes became the key to social harmony. One of the foremost sectors of social life that was governed by these codes was marriage institution and the conduct of women, and though codes had long existed to govern these areas of life prior to the colonial period, the elevation of these codes to sacred in addition to elite manipulation of the social system made the implementation of these laws fundamental to the colonial experience. Prior to the colonial domination of many Muslim states, contractual systems were in place to establish networks of rules for both husbands and wives that guaranteed permanency of rights on both sides (Hallaq, 2009). However, this contractual structure of marriage was gradually shifted to a much more unbalanced implementation with the increased fragmentation of the shari'a system under colonial regimes. In a number of Maghreb states, such as Tunisia, a system of shari'a was set up under *Maliki* and *Hanafi* schools of religious thought that effectively allowed male members of a group to have complete control over women (Booley, 2019). "Kin-based patriarchies," according to Booley, were sanctioned by these schools of thought to craft particular forms of subordination reliant on the continuation of kin and family structures. Even as these laws were simultaneously criticized by western figures as well as left

alone by colonial governments, systems of subordination under family and personal codes upheld by colonial authority continued so long as tribal and kin groups were cemented into the social fabric of the new system. The reformulation of personal status law was, in essence, a construction of colonial experience that articulated new understandings of Islamic law and culture that would extend long past the colonial era (Hussein, 2016).

These systems of subordination, however, did not go uncriticized by the growing modernist movement within Muslim countries. It is important to note that even as personal status and families laws became increasingly important in the dismantling of all other sectors of shari'a, the presence of modernist factions directly influenced how these personal status laws would manifest within growing independence movements. Though Tunisia and Algeria were both part of the French empire, incredibly different policies were adopted for each that influenced how personal status law—and, in turn, the lives of women governed by personal status law—was viewed on a wider scale. The presence of these modernist movements, however, was largely based on the relationship of the state with the colonial regime.

Algeria, on one hand, was officially declared part of France in 1848. Until independence in 1962, all levels of government were directly administered by French officials. As a settler colony, for France, Algeria was less so a territory under control of the empire but rather *part* of France. Tunisia, on the other hand, was ruled in a significantly less direct manner. From 1881 and onwards, Tunisian autonomy was recognized—though France had significant authority, local government was left in the hands of Tunisians and high level positions that had been occupied by Tunisians prior to 1881 were left as figurehead positions (Marshall, 1981). This pattern is mimicked in economic domination of the state as well: where in Tunisia French settlers only

only twenty-five percent of land, in Algeria settlers owned ninety-two percent of land by 1954 (Marshall, 1981). The complete domination of all sectors of the state in Algeria created a paradigm of anti-western lash-back that was less present in Tunisia. Where Tunisian society was positioned to debate over Islam and modernity in the midst of anti-colonial sentiment, Algerian political stimulation could only be directed at the resistance of complete political and economic domination by the colonial regime. The coercive assimilation that was present in the colonial occupation of Algeria was only seen in Tunisia on a much smaller scale. For example, Algerians could only experience full civil rights in the colonial state if they completely renounced Qur'anic law. Furthermore, the colonial authority put into place a number of discriminatory provisions that singled out Muslims, such as the prohibition of public gathering without permission as well as the prohibition of critical speech against the French government (Marshall, 1981). The dichotomy between the settler class and the indigenous created a social hierarchy in which coercive policy pitted the rights of Algerians against European and *pied-noir* populations. In Tunisia, where there was a much smaller settler class, the derogation of native culture was less necessary for continuation of systemic domination of colony.

Thus, in Algeria, the first women's movements appeared historically very late in comparison to other regional historiographies. The settler aspect to the colonial paradigm left colonial officials fearful of a pan-Islamic movement disrupting the colony and, even as progressive ideas about Islam spread throughout the region, strict control was kept over many areas of ideological transfer across borders (Macmaster, 2009). The first significant women's movement, unaffiliated with European led organizations did not occur until 1944, with the communist *Union des femmes d'Algerie* (UFA). As women's groups received boosts from the

nationalist movement in the interwar period, the goals of female emancipation became entangled in the goals of the nationalist movement. There were little effort to look outside the confines of nationalism in analysis of law and personal status codes—all other debates on modernity, feminism, and so on were secondary priorities (Macmaster, 2009; Bouatta, 1997; Madranges, 1991). Furthermore, the notion of modernity was so intricately connected with western concepts of progress that the debate between modernity and tradition was rarely present in nationalist movements aligned with eliminating all forms of colonial domination—including societal and ideological. The complete colonial penetration of the Algerian psyche left little room for organized advocacy for the manifestation of ideological concepts outside the boundaries of nationalism.

Tunisia, on the other hand, saw a number of Islamic scholars throughout the early twentieth century theorizing on modernization of Islam, promoting progressive forms of Islam that would change social and gender norms within Tunisian personal status codes. Like many of modernists, reformers proceeded with caution in respect to existing Islamic structures—preferring modernization to be viewed as a concept *within* Islam rather than a product of the westernization of the Arab state (Booley, 2019). Though these scholars often received backlash, ideas of progressive Islam resonated in society, leading to the first large-scale Tunisian women's movement in 1936, nearly a decade before neighboring Algeria, tied not to nationalist intentions but rather advocacy of changing codes governing female education (Booley, 2019; Grami, 2008). Though nationalist movements were present in Tunisia throughout the early twentieth century, the smaller scale of colonial penetration into the population left more room for ideological debate on how to proceed in conceptualizing the Tunisian state as both modern and Islamic. The

political and academic spectrum was not dominated by singular ideological concepts, but rather by an underlying national consciousness that could be manifested in various ways.

III - The Fight for Independence and the Establishment of New Political Structures

In both Tunisia and Algeria, the legacy of independence struggles marked how political, legal, and social structures would manifest in the post-colonial era. These struggles created paradigms for instituting colonial experience into the practices of newly independent states. In particular, family and personal status codes crafted by colonial norms were fundamental in the systemic analysis of liberation struggles and how women and family structures would fit in to the fabric of independent society. The level of violence in the liberation struggle as well as the colonial penetration mentioned in previous pages contributed to a political stability, or lack thereof, that often created the need to utilize symbols based on social conceptions of identity to gain legitimacy.

As tensions with France increasingly grew, women in Tunisia participated in many protests and other actions advocating for independence. However, there was no grassroots political movement led by women at this time. Rather, the leading nationalist faction in the country was led by Habib Bourguiba, a western-educated lawyer who supported the feminist movement and believed in the modernization of Islam. Bourguiba was part of the New Constitutional Liberal Party (also known as the Neo-Destour) that supported national struggle against the French protectorate. As conflict with the French intensified throughout the early 1950's, alliances between nationalist factions in Tunisia disintegrated and two major factions began competing for power—Bourguiba's modernist faction and Ben Youseff's traditionalist faction (Booley, 2019). As the conflict intensified, Bourguiba sought aid from France. France,

preferring a Tunisia under the leadership of Bourguiba and recognizing that colonial rule in was quickly becoming less likely, terminated the protectorate and granted independence on Much 20, 1956. Thus, Tunisia was pushed into the independence era with a leader favorable to reform based on modernist interpretations of Islam that advocated for progressive family law (Booley, 2019). It is important to note here that not only did Tunisia enter independence with minimal political fragmentation and a stable political faction in government, there was also no widespread purge and exile of leaders that would be seen in the case of Algeria. Furthermore, negotiation for independence was completed with minimal violence against the colonial force. Tunisia entered independence with a cohesive political elite, minimal party fragmentation from competing factions, and legitimacy from stable government leadership (Marshall, 1981)

Algeria saw a much more violent and drawn out struggle than neighboring Tunisia, with the conflict playing out much more through armed struggle than negotiation. Furthermore, where the leading figure in the Tunisian struggle was a feminist who sought to find modernism within the scope of Islam, the women's question and the question of personal status during the Algerian liberation was decidedly deprioritized. Throughout the independence struggle, the FLN refocused the women's question through two different lenses: the women's question is a lesser priority than national liberation, and women would be liberated alongside the nation (Bouatta, 1997). The recasting of women through this narrative allowed the subordination of women in movement to the demands, ideologies, and goals of the movement. Women in the movement were often turned into symbols of the nation—cemented into anti-western, anti-colonial ideology that sought to use the “untouched nature” of personal status law and women from colonial domination as an ideal of what the nation should be (Dalmaso, 2010). Thus, the entrance of

women into the political arena was entirely under the emblem of nationalist conception—women were symbols of the traditionalist movement and, with minimal modernist scholarship in positions of influence, there was little to separate women from the political goals of nationalist conceptions of personal status law.

Algeria's liberation struggle shows the presence of not only a violent endeavor against the colonial occupier, but also a political movement entirely focused on national liberation. Hallaq (2011) states: "The nation-state combined power to rule and subdue, and the right and duty to defend, promote, and claim possession of nation and the citizen..." In order to secure legitimacy to mobilize the population against the French colonial army, the nationalist movement crafted an authority based on the symbolic power of the unified force of the nation and its citizens based on a paradigm in which the identities of Muslim civilians were the centerpiece of the anti-colonial struggle. Personal status norms, and in turn the conceptualization of women under these norms, were central to establishing the legitimacy of the nation against the influence and presence of the colonial state.

IV - The Family Code and the Independent State

As Tunisia and Algeria entered independence, family law was formulated by members of political leadership who chose to "maintain Islamic law, to oscillate between alternatives or to actively promulgate some radical reforms (Grami, 2008)." The political and legal struggles that arose from this choice, however, was based in moral and religious consideration based on a dissonance between pre-colonial Islamic law and what colonial domination had crafted Islamic law to be (Hallaq, 2012). It was not pre-colonial personal status code that Algerian nationalist based the legitimacy of tradition on—it was the conceptualization of personal status and women

that was created during the colonial period. That said, however, to maintain the legitimacy created by building and mobilizing a movement on anti-colonial traditionalism, the conceptualization of Islam created during occupation was modified for further legitimization of power in the independence era (Marshall, 1981). Hussein (2016) states in his book *The Politics of Islamic Law*: "...lacking the capacity to destroy an institution, institutional challengers may be able to exploit its inherent ambiguities in ways that allow them to redirect it toward more favorable functions and effects." Even as newly independent states such as Algeria freed themselves from colonialism, they took institutions crafted and modified by colonialism domination to manifest their own legitimacy in institutions and ideologies created as foundations of identity.

In Algeria, independence was accompanied by both this redirection of colonial institution as well as a hostility against western notions of modernism that was built on years of violent anti-colonial war. Thus, as the new state looked to create and implement new laws, years of relegating women to symbols of tradition and revitalization left a gap in the ability of the political structure to reform family law as the ideological spectrum allowed reform neither in the direction of modernization nor fundamentalism. Though there were several attempts to reform the Family Code, vehement disagreement between different political and ideological factions put reformation off until 1981. However, the increasingly unstable political structure, after years of appeasement to fundamentalist factions, drafted a family code that essentially relegated women as minors. Despite the fact that mass protests forced the bill to be tabled initially, the bill was passed in 1984 (Marshall, 1981).

The political instability of the post-independence state was fundamental in drawing Algeria away from the same modernization project that was being implemented in neighboring Tunisia. Only three years after liberation, a coup put Colonel Houari Boumedienne in power, introducing years of compromises with Islamists that compromised women's autonomy in personal status and family law in order to maintain the legitimacy of government (Turshen, 2002). The only women's organization, National Union of Algerian Women (UNFA), was principally an instrument of the FLN, without any political autonomy outside the objectives defined by the ruling party to craft policies in favor of women. In 1966, Boumedienne went so far as to declare that women had already gained their freedom, and that "women's emancipation must not be made at the expense of moral tradition (Marshall, 1981)."

In Tunisia, on the other hand, in 1956, the Code of Personal Status (CPS) was published by the newly independent government as a move to implement reforms that looked to "evolve" Islamic law into a more modern application. The reinterpreted norms and values of the colonial era on Islamic law were combined with Islamic scholarship to create legal codes tailored to nation-specific consciousness. Followed shortly by a constitution that further laid the groundwork for gendered equality, the CPS redefined the rights and responsibilities of the family and laid the foundations for independent women's organizations, reforms in marriage, divorce, child care, and female autonomy. It is notable that the reform process had very little involvement of women's organizations—though the country saw a number of women's movements and organizations leading up to independence, there were no large scale grassroots organizations in the position to aid the reform progress. Thus, reforming the personal status code in Tunisia was a top-down process that looked to craft reform within Islamic institutions—a so called feminism

from above. Bourguiba went so far as to ask official *muftis* (religious men who often interpreted the Qur'an) to justify new personal status and family laws according to traditional Islamic law. Dalmaso (2010) states: “Bourguiba encouraged scholars to try to open the gates of interpretation (Ijtihad) and to seek further understanding of the spirit of the Qur'anic text in order to produce jurisprudential texts based on values of equality.”

The CPS was not only a reformation of personal status code directed towards modernization, but rather an integral part of the "war against underdevelopment.” It was complimentary to a state-wide program to “diffuse tribalism, classism and kin-based communities in the rural and urban areas.” The laws governing personal status and family, until that point, were thought to hinder both national and economic growth—the addition of political, social, and economic rights to many women would allow exponential growth of the independent economy (Booley, 2019). Thus, women’s organizations were quickly built into the state structure to contribute to national development, unlike Algeria’s singular UNFA intricately tied to state policy.

V - Conclusion

For Algeria and Tunisia, the debate between modernity and tradition is set within the historical landscape of violent colonialism, domination, and the manipulation of traditional systems of law and society. That said, however, the differing manifestation of these things for the two states has resulted in two drastically different systems of law and politics that have utilized family and personal status codes to signify the debate between Islam in the modern context and fundamentalism. The initial colonial experience, wrought with varying levels of cultural penetration and native destruction, created two entirely different landscapes for ideological

discourse: one in which the protectorate of Tunisia saw early debate on Islamist modernism and relative stability in the social landscape and another in which the colony of Algeria saw cultural destruction and lashed back in a nationalist movement that directed singular priority to an anti-colonial, anti-western movement. Similarly, this colonial experience manifested a long-term political stability factor which determined the availability of political leaders, the stability of government institutions, and the ability to maintain legitimacy. Despite the fact that both Tunisia and Algeria were under the umbrella of French colonial jurisdiction, the manifestation and implementation of family and personal status—and therefore the legal treatment of women—shows the aftershocks of various forms of colonial domination on the post-colonial state.

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