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## **Legal pluralism at the heart of a unitary law. French colonial and post-colonial situations (19th-20th century)**

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Post-revolutionary<sup>1</sup> France is a monistic country where the laws, supreme sources, apply in theory to all in a unitary and egalitarian way while being imposed from top to bottom<sup>2</sup>. French law would thus constitute a counter-model of pluralism since the latter is characterized by a heterogeneity of the producers of law, of the legal ordinances in presence<sup>3</sup> and the existence of more horizontal relations<sup>4</sup>. This article takes the opposite view of this *doxa*. I will demonstrate that France, essentially through its colonial empire, has been a pluralist state. It has been and still is, because the colonial empire has not been the only source of pluralism in France. However, yesterday as today, this pluralism is invisibilized by monism and centralization zealots.

That being said, what kind of pluralism are we dealing with? The historiography has first focused on one form of pluralism: that which is perceived through the action of the colonial authorities, and thus of the state. The authorities wished to maintain part of the native legal and judicial systems in force that coexisted with French norms imported and adapted in the French empire. They established the instruments of this pluralism through separate or mixed jurisdictions, through systems of options, etc. This form of pluralism is the one that was already discussed during the colonial period. Admittedly, the term "pluralism" was not widely used at the time, but the reality it encompassed was widely known, taking on various meanings that sometimes originated in French history: "personality of laws", "plurality of rights", etc.

This perspective, which still generates very interesting work today, does not take into account the diversity of forms of pluralism. The evolution of studies on pluralism at the international level opens up avenues that have been little explored for French colonial legal history. To put

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<sup>1</sup> This very contemporary perception of French law will not fail to make the historians smile, for whom the Kingdom of France was, for centuries, pluralist, with very diverse customs applying until the French Revolution of 1789. There is a plethora of works on questions of customs under the Ancien Régime, by historians and legal historians. They obviously deal with questions of the writing down of customs, their mutations and survivals, as well as with questions of conflicts of customs and the way in which individuals or social groups appropriate them.

<sup>2</sup> It is true, however, that legicentrism has been altered recently by the right of any citizen since March 2010 to challenge a law through priority questions of constitutionality (QPC in French). Cf. G. TUSSEAU, *La fin d'une exception française*, in « Pouvoirs », 2011, pp. 5-17 ; F. CHALTIEL, *L'avènement de la QPC en France : du splendide isolement à la spécificité maintenue*, in « Les Petites affiches », 5 mai 2011, p. 39.

<sup>3</sup> It is important to separate the notion of "legal orders" and "diversification of norms". As Norbert Rouland reminds us, "each of us can choose a matrimonial regime, like a type of divorce" (diversification of norms). "On the other hand, when a couple marries both in church and at the town hall, they enter a pluralist system. He submits himself simultaneously to two legal orders whose contents may diverge" (N. ROULAND, « Le destin du pluralisme juridique », *Introduction historique au droit*, Paris, PUF, 1998, p. 549).

<sup>4</sup> J. VANDERLINDEN, *Les droits africains entre positivisme et pluralisme*, in « Bulletin des séances de l'Académie royale des sciences d'Outre-mer », 46 (2000), p. 2.

it briefly, classical legal pluralism focused essentially on the superposition of the systems coming from the colonizers and the systems in place locally, and then emphasized the domination exercised by the colonizers in this framework<sup>5</sup>. In the 1980s, the new legal pluralism emerged in particular from the countries of the South. It focused on the interactions between different forms of orders (official and unofficial) in society - especially in social control<sup>6</sup>. In this frame, indigenous people were no longer perceived solely as "dominated" because they were themselves producers of rights, using those of the colonizers for their own benefit or choosing to ignore them. This framework also introduced a reflection on the norms produced at the transnational level by non-governmental organizations that, in this way, were self-regulating. Classical pluralism and new pluralism share the same way of thinking about legal encounters in terms of differences, confrontations, and avoidances, mostly leaving aside legal hybridizations and transplants.

These forms of pluralism did not cease when the former colonial territories gained their independence and consequently were freed from French sovereignty. With regard to the new pluralism, contemporary sociology has abundantly demonstrated how individuals or organizations create their own rules that will have legal consequences. They then enter into competition with the state, flourish in parallel or replace state norms. As for classical pluralism, it persists in France for multiple reasons. On the one hand, decolonization led to the repatriation to metropolitan France of a dispute that had its roots in the plurality of statutes that existed overseas. Not to mention the fact that colonial normative logics (maintenance of local law) have sometimes persisted in certain French overseas territories, such as New Caledonia. On the other hand, within the metropolitan territory itself, forms of legal singularities of regional, cultural and/or religious origins resist and are even officially recognized. These situations, whether postcolonial or not, have in common that they are legal laboratories invisibilized by the myth of republican unity and have been little duly noted for a lack of political will to fully invest them.

### **Classical pluralism: the organization of relations between the state and native laws in the French colonial empire**

Classical pluralism has been studied throughout the nineteenth and twentieth centuries, including during the colonial period, as it was a tangible and observable situation for anthropologists, but also a political and legal issue for jurists. Its origins predate the colonial period, whether one thinks of the expansion of Islamic currents or, more recently, of the first commercial exchanges of Europeans in sub-Saharan Africa<sup>7</sup>. Similarly, it has developed in

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<sup>5</sup> Cf. R. SMANDYCH and G. LEE, *An Approach to the Study of Law and Colonialism: Toward a Native American Autohistorical Perspective on Legal Change, Colonization, Gender, and Resistance to Colonization*, in *Histoire de l'enfermement et des populations pénales*, Montreal, Presses de l'Université de Montréal, 1995, vol. 28, pp. 55-69.

<sup>6</sup> Cf. the works of S. HENRY (1983), B. DE SOUSA SANTOS (1987) and P. FITZPATRICK (1983), as well as the synthesis on the same period by S. MARRY (*Legal Pluralism*, in "Law and Society Review", 22 (1988), pp. 869-896). On a more contemporary perspective of "new pluralism" : A. GESLIN, *Une brève historiographie du pluralisme juridique : quand les usages d'une notion en font un instrument de luttes politiques*, in « Clio@Themis », 15 (2019), online.

<sup>7</sup> See, for example, B. A. N'GANDO, *Genèse de l'État et du droit au Cameroun (1472-1961)*, Paris, L'Harmattan, 2020.

very diverse geographical areas, including North America with the colonization of New France from the sixteenth century<sup>8</sup>.

During the Ancien Régime, French officials generally committed themselves to respecting specific local rights. This policy continued officially in the 19th and 20th centuries, including under republican governments. Despite this official respect, the norms locally in force (Islamic, Jewish, Hindu, sub-Saharan African customs, etc.) were subjected to a French rereading, particularly from the 19th century onwards: the colonizers settled with an intellectual mold and precise categorizations such as the separation between law and religion, which they projected onto the societies they discovered. These projections of the very notions of "law", "customs", etc. were eventually imposed and have persisted after the end of colonial rule, particularly in Africa. In this context, it is not surprising that researchers are currently talking about the "invention" or "reinvention" of norms and are proposing, for example, to completely deconstruct the notion of "Islamic law"<sup>9</sup>; or that they are questioning the state's rejection of "customs" in Africa and are currently calling for a true decolonization of African laws<sup>10</sup>.

Although the official scope of this respect may have varied from one territory to another, it generally applies only or essentially to one very specific area: the rules known as "personal status", i.e. those concerning the status and capacity of persons. In other words, minority, majority, matrimonial bond and its rupture, guardianship and successions. This term "personal status", which came from Western international law, is relatively fluid in its colonial definitions and sometimes even encompasses contracts and obligations and property rights<sup>11</sup>. In addition to this maintenance of indigenous rules, there was the recognition of local judicial authorities such as cadis, village assemblies, rabbinical judges, etc.

In part of the French Empire, the preservation of personal status and related local jurisdictions was gradually reduced in favour of the law of the colonizer, particularly with the strengthening of the policy of assimilation. Thus, the law of succession was no longer subject solely to native laws, but also to French law when it came to property such as Frenchified or registered buildings. In Algeria, the rabbis lost their jurisdictional prerogatives in 1841 and those of the cadis were limited. In sub-Saharan Africa, customary courts were created, composed of native assessors and a president who was, in principle, the administrator, thus breaking the principle of separation of powers<sup>12</sup>. At the same time, there was a shift in the selection of indigenous judicial personnel according to criteria of loyalty rather than knowledge or skill. Until the late 1920s, the central government rarely intervened directly to change personal status, preferring to leave it to the judges. Several governments subsequently

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<sup>8</sup> See the work of David Gilles on legal issues in New France. For example : *Essai d'histoire du droit de la Nouvelle-France à la Province de Québec*, Sherbrooke, RDUS, 2014.

<sup>9</sup> L. BUSKENS and B. DUPRET, *L'invention du droit musulman : Genèse et diffusion du positivisme juridique dans le contexte normatif islamique*, in *L'Orient créé par l'Orient*, Paris, Khartala, 2021, pp. 71-92.

<sup>10</sup> F. RENUCCI, *Les coutumes dans la fabrique des droits africains*, Paris, LGDJ, coll. "tiré-à-part", 2021.

<sup>11</sup> J.-C. CAREGHI, *Le statut personnel des Vietnamiens en Indochine*, Aix-en-Provence, PUAM, 2002, pp. 24-25.

<sup>12</sup> L. MANIERE, *Deux conceptions de l'action judiciaire dans les colonies. Magistrats et administrateurs en Afrique occidentale française (1887-1912)*, in « Clio@themis », 4 (2011), online.

made attempts to do so with the Berber dahir of 16 May 1930<sup>13</sup> in the French Protectorate of Morocco and the Mandel decree of 15 June 1939<sup>14</sup> in Sub-Saharan Africa.

The jurists and the colonial administration used multiple tools to modify native laws from within, notably the intellectual encirclement of legal knowledge: the colonizers translated and reorganized local legal sources and gave predominance to the written ones. They were unaware of the customs that were really applicable because they did not carry out large-scale ethnological surveys until late in the day<sup>15</sup>. The intellectual instruments of French law - such as codifications - were imported. These codifications of indigenous rights generally began as private initiatives. Two of these codifications, drafted on the initiative of local authorities, however, had a significant impact on the law. The first is the Tunisian Code of obligations written by the jurist David Santillana, which took the form of a mixed code. The second is the "Morand Code", which, written by the director of the Algiers Law School Marcel Morand, was intended to be an Islamic law code reworked using the techniques of the Santillana Code. If the first one, modified, is still in force, the second one, was never promulgated, but it served as a *corpus* of reference to the magistrates of the colonial period<sup>16</sup>.

This overview might lead one to think that the representatives of the colonial state, at their various levels of decision-making, patiently and slowly undermined the indigenous norms still in force without any intervention from the populations mainly concerned. The situation is more complex insofar as the autonomy of the will, as well as the legitimating character of native experts or scholars, were occasionally taken into account. The options of jurisdiction and legislation, for example, which still exist in Senegal and in Togo, allow non-citizens to bring their disputes before a French court and/or to be judged according to French law. For political reasons (domination and prestige oblige), this option is only possible in the sense of abandoning indigenous norms to adopt those of the colonizers. In this system based on an essentially cultural, social and/or racial hierarchy, a French citizen cannot ask to be governed by native laws and jurisdictions.

The study of classical legal pluralism thus logically leads to the assessment of a system in which state law has the last word and in which administrators and magistrates practice the internal erosion of indigenous rules in matters that they are supposed to respect legally. French law is theoretically in a situation of domination, which the use of colonial public order tends to confirm. When faced with a conflict of norms, this public order, according to which the law of the colonizing country prevails as a last resort, is applicable. However, an in-depth study of the case law nuances the observation that colonial law<sup>17</sup> is all-powerful and systematically goes in the direction of assimilation to the norms deemed superior by the

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<sup>13</sup> Dahir du 17 hijra 1348 (16 Mai 1930), « Bulletin officiel de l'Empire chérifien - Protectorat de la République française du Maroc », 30 May 1930, n°918, p. 652.

<sup>14</sup> Décret du 15 juin 1939, « Journal officiel de la République française », 16 juin 1939, p. 7606.

<sup>15</sup> Cf. in particular: *Sociétés coloniales. Enquêtes et expertises*, in « Monde(s) », 4 (2013) ; B. DE L'ESTOILE, *Enquêter en situation coloniale*, in « Cahiers d'études africaines », 228 (2017), pp. 863-919.

<sup>16</sup> O. ARABI, *Orienting the Gaze: Marcel Morand and the codification of Algerian Muslim law*, "Journal of Islamic Studies", 11 (2011), pp. 43-72.

<sup>17</sup> In this article, "colonial law" is understood in a broad sense, i.e. including both French law adapted to the colonies and native laws in the colonial empire, some of which have been transformed by the legal and administrative actors on the spot or by the proximity with other norms. This definition of "colonial law" could be discussed, but that in itself would deserve an article.

colonizers<sup>18</sup>. It should be noted from the outset that court decisions were of fundamental importance in the colonial environment because they were the main source of conflict resolution, but also of many legal questions, due to the weakness of legislation. The magistrates, who had more leeway than in metropolitan France in the exercise of their functions<sup>19</sup>, did not systematically favor French law over native law. Jurisprudence varies in time and space, as well as according to the judge's "intimate conviction". The "intimate conviction" is a method of judgement which applies to French criminal law and allows magistrates to understand the act by all means of proof. However, in the colonial situation, it is also used in civil law and public law. It happens that magistrates render decisions not by following legal logic, but by taking into account primarily culturalist or sometimes racial aspects<sup>20</sup>.

The decisions of French courts in matters of mixed unions illustrate these fluctuations. Thus, in Algeria, in the case of marriages between French citizens and native subjects (and therefore non-citizens), the judges, depending on the period, favoured assimilation of the wives to the status of their husbands or, on the contrary, maintained their status as citizens. Similarly, they may have recognized that the child, in the name of his or her interest, had the same status as his or her citizen mother. In these two cases, the judges thus disregarded the logic of French law as well as that of Islamic law, both of which favour assimilation to the status of the father and thus the patriarchal model. At the same time, for culturalist reasons, judges have sometimes stripped women of their citizenship because they exclusively live in an indigenous environment. To justify their actions, they present their citizenship as a discriminatory factor or as a status that does not fit with their actual lifestyle<sup>21</sup>. The fear of a lack of "spiritual adherence" to French law was also cited as a reason for not recognizing the status of French citizen for Native people when the legal reasoning was in their favour. In a decision of the Court of Appeal of Nîmes (thus a non-colonial jurisdiction), the judges evoked both racial and culturalist arguments to reject the rights of children born to a French colonial administrator and two African women<sup>22</sup>. The commentary of this judgment written by the President of the Bar Association of Nîmes, Roger Valabrègue, also suggests purely pragmatic reasons<sup>23</sup>. The representativeness of this decision is questionable because colonial jurisprudence has, for its part, tended to protect the native wife, or at least the children, by using, from the beginning of the 20th century, the notion of "abuse of right" to give effects to marriages recognized as void (so-called "putative" marriages<sup>24</sup>), in order to protect the children born of these unions<sup>25</sup>. It is

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<sup>18</sup> The importance of judicial decisions, which is obvious to our Anglo-Saxon colleagues, is often underestimated in French historical research, perhaps out of mistrust or laziness towards the technicality of the law, perhaps out of a strict belief in the pyramid model or in the fact that the magistrate is merely the mouthpiece of the Law. However, jurisprudence is the law as it really applies in a given society, in a given temporality, to those subject to trial; it is an extremely lively law, sometimes contradictory, sometimes innovative. Moreover, it is the mirror of social practices, demands and histories.

<sup>19</sup> This has been amply demonstrated by the work directed by Bernard Durand and Martine Fabre (*Le juge et l'Outre-mer*, Lille, CHJ éditions, 2004-2013).

<sup>20</sup> For example, when it comes to anthropometric expertise to determine the citizenship of an individual.

<sup>21</sup> Tribunal de Mytho (Indochina), 8 juillet 1925, « Penant » (« P. »), 1926, I, p. 272.

<sup>22</sup> Cour d'appel de Nîmes, 17 juin 1929, « P. », 1930, I, p. 54. The decision was confirmed in cassation (Cour de cassation (chambre des requêtes), 14 mars 1933, « P. », 1933, I, p. 213) and heavily criticized by the colonial lawyer Henry Solus: note under the decision of 17 June 1929, « Sirey », 1929, II, p. 129 and for the Cour de cassation, note under Cour de cassation, 14 mars 1933, cit. pp. 213-215.

<sup>23</sup> R. Valabrègue, note under cour d'appel de Nîmes, 17 juin 1929, cit. p. 57.

<sup>24</sup> The marriage is recognized as void, but it still has effects. Indeed, if one or both spouses are in good faith, the judges recognize that it can have legal effects (notably on the status of children). It is then called "putative".

true, however, that this jurisprudence emanated from the Maghreb and Indochinese jurisdictions, and doesn't concern Sub-Saharan Africa.

### **The "new pluralism": highlighting the increasing complexity of legal relationships**

This multiplicity and complexity of the jurisprudential answers were largely highlighted by Jean-Paul Charnay in his book entitled *La vie musulmane d'après la jurisprudence de la première moitié du XXe s.* (1965). This is not the only contribution of this book, which also presents the strategies of the litigants<sup>26</sup>. J.-P. Charnay describes cases that clearly show that the natives were before the French justice system not as victims, but to assert what they considered to be their rights, whatever the means used: multiplication of procedures, choice of the most advantageous law, seizure of different courts... J.-P. Charnay's work thus largely prefigures what will be at the heart of the "new pluralism": the natives do not limit themselves to undergoing colonial domination, they use and manipulate the colonizers, and they claim their rights. From their point of view, the study of pluralism cannot be limited to the relationship between the state and indigenous institutions. The State is one actor among others in the various options that open up in the event of conflicts or claims.

From the 1980s onwards, the "new pluralism" systematically highlighted the role of actors considered to be in the minority in defending their own interests. Previously identified primarily as victims, which Marxist historiography tended to reinforce, native people are also identified as actors. As a result of the "new pluralism", a social history and sociology of law has emerged from below, in which the state is a producer of norms among others, which can be used, manipulated, for its own interests or a certain idea of justice. It has inspired work on heterogeneous areas, periods and actors, such as the use of colonial justice by African women<sup>27</sup>. This perspective has highlighted the intertwining of legal orders, at different scales, and with their own reciprocal consequences - what Boaventura de Sousa Santos has called "inter-legality"<sup>28</sup>.

The analysis of a simple conflict concerning successions before the judge makes it possible to illustrate the differences in scale - which would be synonymous here with "divergent

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<sup>25</sup> Cour d'appel d'Alger, 1er juillet 1872, « Journal de Robe », 1872, p. 203 ; cour d'appel d'Alger, 26 mai 1879, « Dalloz Périodique », 1881, I, p. 161; cour d'appel d'Alger, 13 février 1903, « Revue algérienne de législation et de jurisprudence » (« RA »), 1904, II, p. 141; cour d'appel d'Alger, 5 avril 1906, « RA », 1907, II, p. 233; justice de paix d'Alger, 13 mai 1914, « RA », 1915, II, p. 208; cour d'appel de Saïgon, 11 juillet 1930, « P. », 1931, I, p. 15.

<sup>26</sup> In English-speaking countries, these strategies are conceptualized under the name of "forum shopping" ("élection de juridiction" in French, but this French expression is not very explicit). The term "forum shopping" became popular in the 1980s (F.K. JUENGER, *Forum shopping, domestic and international*, in "Tulane Law Review", 63 (1988-89), p. 553 ss.). On the application of "forum shopping" during the colonial period, see in particular M. SHARAFI, *The Marital patchwork of Colonial South Asia: forum shopping from Britain to Baroda*, in "Law and History Review", nov. 2010, pp. 979-1009. It is also applicable to ancient imperial situations: C. HUMFRESS, *Thinking through Legal Pluralism: 'Forum shopping' in the Later Roman Empire*, in *Law and Empire. Ideas, Practices, Actors*, Brill, 2013, p. 223-250.

<sup>27</sup> M. RODET, *Le délit d'abandon de domicile conjugal ou l'invasion du pénal colonial dans les jugements des tribunaux indigènes au Soudan français (1900-1945)*, in « French Colonial History », 2009, pp. 149-167.

<sup>28</sup> B. DE SOUSA SANTOS, *Droit: une carte de lecture déformée. Pour une conception post-moderne du droit*, in « Droit et Société », 10 (1988), pp. 363-390. Cf. also B. DUPRET, *Pluralisme juridique, pluralité de droits et pratiques juridiques : théories, critiques et reformulation praxéologique*, in « Revue générale de droit », 49 (2019), 2, pp. 602-603.

readings" - of the authorities and the local populations on the role of the courts. In April 1938, the Algiers court was called upon to rule on a case of succession<sup>29</sup>. Driss Faïd, an Algerian Muslim (a French subject, but not a citizen) and Catherine Lombardi, a French citizen, were married by the *cadi*. They have a daughter, Meriem Faïd. When Driss Faïd died, the question of his inheritance arose. Catherine Lombardi and Meriem Faïd then turned to the French courts. From this case, we can see how the same institution does not mean the same thing from the point of view of the State and of individuals. For the French authorities, the *cadi* jurisdiction in Algeria was a necessary but exceptional and provisional mode of regulation, with the State gradually attempting to control it (appointment and salaries of *cadis*, appeal of *cadi* decisions to an appeal court applying Islamic law by French professional judges, etc.). For Muslim subjects, the *cadi* is their main, not to say only, interlocutor in the "legal" stages of marriages and successions; he also has a role of intercession in case of conflicts. However, this loyalty to the *cadi* institution is interrupted when Catherine Lombardi and Meriem Faïd present their case before the French courts, thus raising questions about the nature of their expectations.

The expectations of the different protagonists are diverse. The court takes a clear position in defense of French identity - which here merges with the interest of the widow and the child born of the union: the marriage is declared "putative", which means that it has all the effects of a marriage governed by French law. Moreover, Meriem Faïd is considered a French citizen because she was born to a French citizen, even though, as we have seen, this transmission does not respect the logic of French law, nor that of Islamic law, according to which the status of the father prevails. This decision is not isolated: it is presented in the *Revue algérienne*, along with others, with similar conclusions. On the side of Meriem Faïd, going before the French justice is not a question of identity, it is not a way to break with the Algerian Muslim society of which she is an integral part<sup>30</sup>. She comes to claim what is, according to her, her fair share of inheritance. By making the succession subject to French law, she inherits more than under Islamic law.

Classical pluralism and new pluralism have at least one thing in common. They maintain categories that tend to oppose, differentiate or ignore each other: the natives on the one hand, the settlers on the other. Yet, they obscure the hybridizations and the legal crossbreedings. However, these hybridizations are present among the jurists themselves and in their production, as shown by the work carried out by David Santillana on the Tunisian Code of Obligations for which this jurist has recourse to several European laws, Islamic norms and Roman law<sup>31</sup>. Santillana is not an isolated example ; when he worked in the Bey's foreign affairs department, he was in contact with actors such as Antoine Conti, whose career has not been of much interest to historiography<sup>32</sup>. Antoine Conti (1836-1893) poses basically the same question as Santillana: coming from a Corsican family that settled in Egypt during the

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<sup>29</sup> Tribunal d'Alger, 7 avril 1938, « RA », 1941, II, p. 22.

<sup>30</sup> She married a cousin in 1937 (Yazid Faïd), then another Algerian in 1940 (Ahmed Zouane).

<sup>31</sup> A. BALDINETTI (a cura di), *David Santillana. L'uomo e il giurista (1855-1931). II. Scritti inediti (1878-1920)*, "Quaderni di diritto musulmano e dei paesi islamici", Roma, Istituto per l'Oriente C.A. Nallino, 1995; F. RENUCCI, *David Santillana, acteur et penseur des droits musulman et européen*, in « Monde(s) », 2015, pp. 25-44 ; B. SORAVIA, *Ascesa e declino dell'orientalismo scientifico in Italia*, in *Il mondo visto dall'Italia*, a cura di A. GIOVAGNOLI et G. DEL ZANNA, Milano, Guerini, 2005, pp. 271-286; D. E. STIGALL, *The Santillana Codes. The Civil Codes of Tunisia, Morocco and Mauritania*, Rowman and Littlefield, 2017.

<sup>32</sup> Mohamed Salah Mzali had access to the correspondence between Antoine Conti and Khereddine on which he based his book *La situation en Tunisie à la veille du protectorat* (Tunis, Maison tunisienne de l'édition, 1969).



Napoleonic era, he integrated into the Ottoman world and possessed a great knowledge of Islamic mores and the Arabic language<sup>33</sup>. It is besides as "Egyptian" that he interests the bey of Tunis. As Julia Clancy-Smith recalls, he represented for the latter "conduits of information, (...) barears of ideas regarding political and social reform programs, between the Egyptian and Tunisian states". Therefore, Conti is no more culturally an orientalist than Santillana because he does not frame from the West to the East, but in both directions at the same time. How then can these actors be defined ? On a very different time and political context, Antoine Vauchez uses the term "cosmopolitans" with regard to jurists working in European networks<sup>34</sup>. This term could indeed be appropriate, even if it is sometimes interpreted as conveying a globalizing worldview, which is not necessarily the case for our protagonists<sup>35</sup>. Since these individuals are characterized by a plural but coherent identity, why not simply call them "pluralists". Alongside the orientalists, another group would be added, that of the "pluralists". There remain the "Orientals" who are passionate about Western cultures and project their own methods onto them, and who also seem to be unnamed as a group: how should we name them? The "westerners"? The question remains open.

The fact that classical pluralism and new pluralism are mainly concerned with colonial situations does not mean that they have only historical relevance in France. The former in particular, which is hardly compatible with a common law that would apply systematically and uniformly to all, did not disappear completely when the countries that made up the French colonial empire gained their independence and sovereignty.

### **The persistence of legal pluralism in France**

Classical pluralism is the one I am most interested in here because its existence is denied in a Republic with unified domestic law presented as being the same for all. In fact, pluralism persists today in France. In the first place, in situations that stem from colonial rights and practices, such as litigation concerning questions of nationality. Petitions for recognition or reinstatement of nationality are sometimes based on the fact that an Algerian ancestor had become a French citizen. Contemporary French judges have to deal with these questions dating from the colonial period<sup>36</sup>. Even more directly, the question of personal status and, more generally, the maintenance of native rights has arisen in certain overseas territories, particularly in New Caledonia, where Kanak customs still apply<sup>37</sup>.

In parallel to these pluralisms resulting from colonial and post-colonial situations, there is a recognition of culturo-religious singularities in France. The hyper-mediatization of these issues when it comes to Islamic norms such as dress codes in schools and in the public space

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<sup>33</sup> J. A. CLANCY-SMITH, *Mediterraneans: North Africa and Europe in an Age of Migration, c. 1800-1900*, University of California Press, 2010, p. 72.

<sup>34</sup> A. VAUCHEZ, *Une élite d'intermédiaires. Genèse d'un capital juridique européen (1950-1970)*, in « Actes de la recherche en sciences sociales », 166-167 (2007), pp. 54-65.

<sup>35</sup> This globalizing vision of the world is especially present in the philosophical definition of the term. The sociological definition of cosmopolitanism can be different. For a realistic approach to cosmopolitanism in sociology, see U. BECK, *Qu'est-ce que le cosmopolitisme ?*, Aubier, 2006.

<sup>36</sup> For example : Cour de cassation (chambre civile), 28 juin 1966, online (see « Legifrance ») ; Conseil d'État, 5 avril 1996, n°118596, unpublished, online ; Cour de cassation (Chambre sociale), 27 novembre 1997, online ; Cour de cassation (chambre civile), 27 février 2013, unpublished, online ; Cour de cassation (chambre civile), 16 décembre 2015, unpublished, on line.

<sup>37</sup> C. DEMMER and B. TREPIED (a cura di), *La coutume kanak dans l'État. Perspectives coloniales et post-coloniales sur la Nouvelle-Calédonie*, Paris, L'Harmattan, 2017.

could lead one to believe that they are systematically condemned in the name of French law. However, observation of the field leads to an alternative conclusion. If certain Islamic norms have been "forbidden (...), others are integrated, sometimes very favorably, into the French legal corpus"<sup>38</sup>. As Stéphane Papi's work shows, the introduction of Islamic finance does not pose any major problem and is even encouraged by the government. In other cases, this researcher reports accommodations, i.e. compromises made by both parties based on what brings them together. This takes place in the area of mosque construction (the issue of minarets is of particular concern to the surrounding population) or funeral law, whether it is a question of time limits or burial conditions<sup>39</sup>. These accommodations cited concern mainly Islamic norms because of the evolution of migration and/or religious practices in France, but the same consensualist mechanism has been applied for decades to Christians in France, as with the creation of diocesan associations in the 1920's<sup>40</sup>. Other examples could be given concerning Islamic norms, such as the *waqf* or the "*fâtiha* marriage" which is the result of cultural syncretism with Europe<sup>41</sup>.

Lastly, contrary to what a too quick reading of the regional organization might lead one to believe, there are specific legal-institutional features in metropolitan France, such as in Corsica, Brittany or Alsace-Moselle. In the latter case, entire sections of German law have been recognized as applicable in France. Indeed, after the French defeat in 1871, the German Empire annexed this part of the territory until 1918-19. During this period, German law was extended to the area. When Alsace-Moselle was again attached to France after the First World War, the question arose as to whether this specificity should be maintained. The French government chose to keep part of the German norms<sup>42</sup>. This exceptional regime in Alsace-Moselle mainly concerned civil law, religious law (the 1905 law abrogating the concordat did not apply there) and commercial law. As French Civil law and Alsatian-Moselle law<sup>43</sup> have come closer together, or as certain rules have since fallen into disuse, the current differences only concern "labor law, social security, the law of associations, crafts, social assistance, hunting, the land register, communal law, the system of pharmacies and religious services"<sup>44</sup>. It should be noted that this incorporation was carried out, according to our first observations, under technical conditions quite similar to what occurred during the colonial period, both in the fields concerned and in the method<sup>45</sup>.

## Pluralistic laboratories in France: a history of missed appointments

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<sup>38</sup> S. PAPI, *Normes islamiques et droit interne en France. De quelques zones de confluence*, « Droit et Société », 88 (2014), online.

<sup>39</sup> *Ivi.*

<sup>40</sup> *Ibidem*, note 29.

<sup>41</sup> S. PAPI, *Les mariages à la fatiha et le droit français*, in « Revue du droit des religions », 2017, pp. 129-140.

<sup>42</sup> E. COUTANT, *L'Alsace et la Moselle : terrains d'expérimentation de la réforme du droit civil et commercial français (1918-1975)*, PhD (thèse de doctorat), University of Bordeaux, 2018.

<sup>43</sup> I have deliberately chosen the expression "Alsatian-Moselle law" and not "Alsace-Moselle Local laws". For me, this last denomination reinforces the marginalization of Alsatian-Moselle law. It leads one to see it as folklore, whereas it has, on the contrary, been the bearer of innovation. Moreover, the expression "Alsace-Moselle Local laws" suggests that there is only one exception (Alsace-Moselle) to a general law. However, this territory is not the only one where rules different from those known as "national" or "common" are applied.

<sup>44</sup> Decision n°2011-157 QPC of August 5, 2011. SOMODIA Company (ban on Sunday work in Alsace-Moselle), online.

<sup>45</sup> With a facilitated integration when there was not already a legislative arsenal on the issue.

The comparison between Alsatian-Moselle law and colonial law does not end there. In both cases, these laws have been identified as forms of "legal laboratories". What do I mean by that term ? A place of pragmatism and experimentation where researchers (in this case lawyers) take risks for the sake of a solution, a discovery, allowing possible improvements. There are many examples showing that reforms were carried out in colonial territories before they existed in France: this is the case of community service ("travaux d'intérêt général")<sup>46</sup>, certain police techniques<sup>47</sup>, the professionalization of justice of the peace ("justice de paix")<sup>48</sup>, the simplification of legal procedures, the organization of the courts of assizes<sup>49</sup>, the creation of "local parliaments"<sup>50</sup>, etc. The same is true for Alsace-Moselle, where social law and the reflection on regionalization<sup>51</sup> were much more advanced than in the rest of France. Examples are common to Alsace-Moselle and to colonial law: this is the case of the profession of avoué. In France, the avoués had the task of representing the parties, but not of pleading, nor, as a ministerial officer at least, of assisting them. Conversely, in the colonial empire and in Alsace-Moselle<sup>52</sup>, there were no avoués and lawyers had both representation and assistance missions. Finally, the offices of avoués were abolished in France in 2012: the common law has thus come closer to the situation in Alsace-Moselle and the overseas territories. One might conclude that these territories have played the role of "legal laboratories" with a feedback effect on common French law. In reality, it is more a question of missed opportunities.

In the first half of the twentieth century, the colonial and Alsatian-Moselle situations concerning the avoués were evoked in support of the abolition of this office in the doctrine. The abolition of the avoués in 2012 was not based on the Alsace-Moselle and colonial

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<sup>46</sup> The creation by the decree of August 9, 1903 of "public utility work" ("travaux d'utilité publique") is reminiscent of the general interest work instituted by the law of June 10, 1983. The days of imprisonment were thus transformed into tasks (earthworks, excavation or transport of materials, etc.) under the supervision not of agents of the prison service, but of agents designated by the local authority (road-menders, nurserymen, etc.). However, the two reforms are not precisely the same in their modalities. The motivations of their creators also diverged. In 1903, the aim was to combat the ineffectiveness of prison sentences for Muslims subjects, the cost of internment and the need for manpower. In 1983, the measure essentially responded to a desire to reduce repression, even if the factor of prison overcrowding could not be ruled out.

<sup>47</sup> Method transfers took place to metropolitan France during the Algerian War: E. BLANCHARD, *Police judiciaire et pratiques d'exception pendant la Guerre d'Algérie*, in « Vingtième siècle. Revue d'histoire », 90 (2006), pp. 61-72.

<sup>48</sup> See F. RENUCCI, *Ernest Zeys ou le parcours d'un juge de paix en Algérie*, B. DURAND et M. FABRE (a cura di), *tome VI : Justicia illitterata : aequitate uti ? La conquête de la toison*, Lille, CHJ éditeur, 2010, pp. 67-85.

<sup>49</sup> The organization of Algerian criminal courts offers a good example. In these courts, magistrates and assessors deliberate together on guilt and on the application of the sentence, contrary to what happens in the assize courts in France. In 1903, the colonial lawyer Eyssautier proposed to apply this reform to the Algerian assize courts as well, and then, if the experience proved conclusive, to those in metropolitan France (L.-A. EYSSAUTIER, *Cours criminelles musulmanes et tribunaux répressifs indigènes*, in « RA », 1903, I, p. 118). Indeed, this reform was partially carried out in France with the law of March 5, 1932, then completely with the law of November 25, 1941.

<sup>50</sup> In the colonies, councils, delegations, etc., organized as small parliaments, had important powers in budgetary and infrastructure matters. The most studied historical example is that of Algeria: J. BOUVERESSE, *Un Parlement colonial ? Les délégations financières algériennes 1898-1945*, Rouen, Publications de l'Université de Rouen et du Havre, 2008.

<sup>51</sup> See the developments that Céline Pauthier devotes to these very interesting debates which foreshadow the future policy of regionalization in France : C. PAUTHIER, *Projets parlementaires de régionalisation en Alsace dans l'entre-deux-guerres : la nostalgie de l'autonomie perdue*, J.-M. Woehrling (a cura di), *Centenaire de Constitution de 1911 pour l'Alsace-Lorraine*, Strasbourg, Publications de l'Institut du droit local alsacien-mosellan, 2013, pp. 199-214.

<sup>52</sup> E. COUTANT, cit, p. 364.

precedents, but economic issues and the very contemporary evolution of judicial practices justified it. Indeed, the Attali report of 2008, which advocated this abolition and was followed by the facts four years later, only mentioned the 1971 reform which abolished the monopoly of *avoués* for certain acts of representation and was in line with its continuity<sup>53</sup>. I can therefore conclude that our pluralist laboratories are known since the doctrine quotes them, but that the political representatives more particularly do not reinvest them, or even deliberately ignore them<sup>54</sup>. In this sense, these laboratories, interesting as they are, are precursors rather than incubators that would lead to effective and immediate reforms. Even when the direct link can be proven, these "pluralist laboratories" are invisibilized, either by forgetting their origins or by a continuous marginalization, even denigration, of localism.

Legal laboratories have not only been forgotten, they have also been consciously marginalized. The place of colonial law in the nineteenth century and in the first half of the twentieth century demonstrates this perfectly. Colonial law was defined as a discipline only in the second half of the nineteenth century, with considerable uncertainty as to its exact scope. It was very rarely introduced into law schools and owed its relative survival as a subject to the lobbying of a few jurists, foremost among whom was Arthur Girault, famous for his textbook and his Spencerian vision of evolutionism. In the empire, colonial law was presented above all as an incremental step towards the imposition of French Civil law at some point in time. The same is true for Alsace-Moselle. In 2011, while recognizing that there was indeed a specificity of Alsace-Moselle law within French Civil law, the Constitutional Council did not fail to point out that it was temporary in nature, since the laws of 1919 and 1924, which maintained certain provisions of "local law", were of a transitory nature. The decision goes even further. If the Alsatian-Moselle exception is recognized, it cannot claim new singularities in relation to common law<sup>55</sup>. It is thus easier to understand why colonial law and Alsatian-Moselle law could hardly play the role of "models" when the stated objective of the authorities was to bring them into the fold of ordinary law in the more or less long term.

But why do they remain invisible and/or consciously marginalized? It is not only in defence of a unitary and egalitarian law, but also in the name of the certainty of the superiority of French law. In the colonial case, it was impossible for French governments to claim borrowing from a law of the margins that was considered subaltern. In the case of Alsatian-Moselle law, it was also difficult to use the German "model" to reform French law, even though Germany was first presented in political discourse as France's main enemy, and then as a defeated and therefore inferior enemy. This does not mean that the will to make other laws a basis for reflection, or even for reform, is absent from French legal history, but in the end it comes up against a political choice: the impossibility of assuming borrowing from others. The French law, elevated to the rank of model for Europe and beyond, with the codifications of the turn of the 19th century, remains as if frozen in this myth of grandeur. How can one accept, in this perspective, that rights considered inferior and marginal can improve it? It is therefore no coincidence that the most complete and innovative experiments in mixed law in the colonial empire do not concern French law, following the example of the Tunisian Code of Obligations drafted by Santillana, which was essentially intended for Tunisian Muslim protégés.

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<sup>53</sup> Decision n°213 completely abolishes the *avoués* at the courts of appeal (444 *avoués* grouped in 235 offices), in *Rapport pour la libération de la croissance française*, J. ATTALI (under the presidency of), p. 166, online.

<sup>54</sup> C. PAUTHIER, cit.

<sup>55</sup> Decision n°2011-157 QPC of August 5, 2011, cit.

## Conclusion

Legal pluralism has thus existed and still exists in France. When we put together the experiences cited and partly developed (colonial law and Alsatian-Moselle law, the taking into account of religious or culturo-religious norms recognized at the judicial or administrative levels) and the experiences only mentioned, such as the statutory differentiation of Corsica (2002) and Saint-Pierre-et-Miquelon, political autonomy (from 1998) in New Caledonia, customary specificities in French Guiana, with the Amerindians<sup>56</sup>, and in New Caledonia, this phenomenon no longer seems so marginal. Moreover, it is a phenomenon on the move, as shown by the works of Norbert Rouland<sup>57</sup> and Sabine Lavorel<sup>58</sup>. However, the dynamics of pluralism sometimes go in opposite directions because of local contexts. For example, the recent departmentalization of Mayotte is moving in the direction of assimilation to french law: questions of personal status are no longer the responsibility of the *cadis* (2010) but of French judges.

These laboratories of pluralism have been invisibilized and marginalized. Colonial law, Alsatian-Moselle law, as well as the specificities of the application of law in Corsica or in the Overseas Territories, are reduced to local folklore<sup>59</sup>. This pluralism is expressed largely through case law, administrative decisions, and much more rarely laws. When it does, it is clearly stated that it is transitory and/or exceptional. Its legal security is only partially guaranteed: as soon as it is officially recognized, pluralism is already an endangered species<sup>60</sup>.

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<sup>56</sup> With, for example, the officialization of tribal chiefs, in the name of the principle of adaptation of French law. Cf. P.-Y. CHICOT, *Le principe d'indivisibilité de la République et la question des minorités en Guyane française, à la lumière du cas amérindien*, in « Pouvoirs dans la Caraïbe. Revue du CRPLC », 2000, pp. 175-197, online.

<sup>57</sup> The work of Norbert Rouland questions the place of pluralism in legal history. More recently, Jean-Louis Halpérin has proposed an alternative methodology in legal history that includes taking into account the legal history of minorities and thus pluralism (J.-L. HALPÉRIN, *Is it time to deconstruct the myths of French legal history?*, in « Clio@themis », 5 (2012), online).

<sup>58</sup> The work of Sabine Lavorel emphasizes the pressure exerted by cultural and linguistic minorities, etc. in France to have their claims transposed into law. S. LAVOREL, *Des manifestations du pluralisme juridique en France : l'émergence d'un droit français des minorités nationales*, PhD, Université de Grenoble, 2007. This thesis examines this question of pluralism through questions of public law.

<sup>59</sup> For example, C. Gueydan begins his article on the law of Alsatian-Moselle law with this sentence: "An unusual object in the French legal landscape, the regime of the local law of Alsace-Moselle..." (*La constitutionnalisation du droit d'Alsace-Moselle et la question prioritaire de constitutionnalité*, in « Revue française de droit constitutionnel », 96 (2013), p. 857.

<sup>60</sup> In 2018, however, French President E. Macron announced a possible constitutional law reform incorporating a "right to territorial differentiation". This reform is still in the works. It is the 3D (decentralization, differentiation, deconcentration) bill. For the "differentiation" part, the announced objective is that "each territory should have laws and regulations adapted to its specificities". This "differentiation" is in principle already possible in constitutional law if it respects the principles recently recalled by the Conseil d'État. In its opinion of February 21, 2019 on the bill relating to the powers of the European Community of Alsace, the Conseil d'État considered that the transfer of powers to the European Community of Alsace could be justified in the name of the general interest. The bill under consideration grants powers to this community in the areas of cross-border cooperation, tourism, roads, elections, personnel, promotion of bilingualism, etc. It remains to be seen whether in practice this "differentiation" will be fundamentally different from the possibilities of "adaptation" that already exist within French law.