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CRITICAL RACE PERSPECTIVES ON INTERNATIONAL LAW SYMPOSIUM

Building Islam as a race in French colonial law

MOUHAMADOU NDIAYE — 16 February, 2018



The conquest of Algeria introduced in French law new chapters pertaining to the treatment of indigenous people. In fact, the French Algeria gained the status of department in 1848 and then, was incorporated into the territory of France with, normally, the application of the *Code Civil*, the civil law. However, the colonial authorities developed in parallel a set of laws with the intention to exclude native Algerians from nationality and citizenship. These laws had the particularity to mark out all indigenous Algerians as «Muslims », building by the way a legal category with no sociological basis.

This artificial category denoted a racial discrimination, concealed under the title of «Muslim ». The designation had no link with religion but only with race. In reality, this denomination was a means to exclude Arabs from the rights given to citizens and to dominate them by the colonial system. The Algier Court of Appeal confirms this fact by a judgment given in 1903. Seized by an Algerian Christian denying his categorisation as «Muslim » preventing him from full citizenship, the Court of Appeal underlines that the term «Muslim » « has not a strictly confessional meaning but refers to all individuals of Muslim origin who, having been denied the right to a homeland, have preserved the characteristics of Muslim, without any distinction of their belonging or not to the Mohammedan cult ».

In other words, the religion is not the criterion to enter in the category of «Muslim », but only the belonging to the Arab people. In fact, the other natives of Algeria, the Jews, will be granted full nationality and citizenship in 1870, by the Crémieux decree. This eponymous decree of the French minister of justice allowed Jews to integrate French citizenship under the mere condition of proving the settlement in Algeria before colonization or the birth in Algerian departments. The minister Crémieux issued, in the same day, another decree imposing to Algerian « Muslims » a constraining procedure of naturalisation at their legal majority to be accepted as citizens.

The building of a race called «Muslim » had consequences in the acquisition of nationality as well as in the gaining of full citizenship for indigenous persons.

Denying the French nationality to the «Muslim »

The primary way to obtain French nationality has been, since 1804, by *jus sanguinis*,

granting citizenship to anyone born from a French male individual. In another hand, foreigners could be integrated to nationality at their legal majority, by *jus soli*, if they were born in French territory. Thus, Algeria being treated as a French department, its population should normally automatically access nationality under international law. But a *senatus-consulte*, edicted in 1865, officialised the discrimination of Algerians. The *senatus-consulte* provides that « the indigenou is French. Nonetheless, he'll continue to be ruled by Muslim law ». This *senatus-consulte* was the act which excluded native Algerians from all rights given to a French national. Furthermore, it created a new category of French, the «Muslim ».

The « Muslim » thus was not automatically included in French citizenry. If he wanted to enjoy full citizenship, the « Muslim » was obliged to engage in a procedure of naturalization, as a foreigner. The *Conseil d'Etat* and all administrative jurisdictions used to consider that Algerians applied to enter in nationality as it had never been provided to them. To become citizen, the Algerian first had to abandon his personal status of « Muslim ». This meant renouncing to five aspects of Muslim law : polygyny, the possibility to marry off his child without his consent, repudiation, the advantage of men in inheritance and the myth of « sleeping-child »^[1].

Nevertheless, the process was tough to achieve. The French laws tended to exclude Arabs of all changes in the field of nationality. The adoption of dual *jus soli* in 1851 and the alleviation of its conditions in 1889, illustrates that racial discrimination. By these acts, an individual born in France from at least one foreigner parent, born himself in France, obtains automatically citizenship at his birth. But the 1889's act namely excepted the « Muslims » of Algeria in its application. In the same time, the European foreigners born in Algeria had the possibility to become French at their legal majority by a simple declaration. They could also benefit from the dual *jus soli*. Though, the people categorised as « Muslims » didn't have that possibility, even if they were more entitled to obtain nationality for living and being born in French territory. The indigenou of Algeria, the « Muslim », had less rights in his own country than foreigners from European nations. That discrimination was not limited to Algerians. Also, other Arab individuals were systematically denied access to nationality, even when meeting the conditions of the 1889's act.

Discriminating of the « Muslim » as citizen

The « Muslim » did not enjoy full citizenship, even if the *senatus-consulte* of 1865 accepted to consider him as a French subject. The difference of treatment from a normal French citizen was justified by the treaty between French conquerors and the Bey of Algier. In a judgment of 1862, the Appeal Court of Algier claimed that the legal status of « Muslims » proceeded from a tacit agreement of Algerian people not to be ruled by French law given that the Bey asked conquerors to preserve their religion and their belongings. So, by that treaty, they accepted to undergo legal racial discrimination.

That racial discrimination built under the denomination of Islam was implemented by a set of laws called « *code de l'indigénat* », an amount of various rules pertaining to indigenou. All those rules were exorbitant of the *Code Civil*. This « juridical monstrosity », the fact of getting theoretical nationality without citizenship, sums up the essence of this ethnical discrimination.

In 1834, the possibility was given to military and administrative authorities to put in sequestration the belongings of tribes, to deliver collective fines and put any « Muslim » under compulsory residence or deportation. The particularity of this rule was that these

procedures weren't taken under the control of a judge but on the arbitrary of military or administrative authorities.

That legal regime permitted collective punishments, which is totally unknown in French law. It allowed also a violation of the civil rights « Muslims » could claim to have. The « *code de l'indigénat* » incriminated the public meetings, the outings of a common's territory without permission and even the renewed complaint to colonial authorities to get a presumed right. Also, the indigenous could have penal punishment by refusing the obligatory drudgery of work or transportation.

To summarize, French law built in Algeria, from 1830 to 1944, the date of indigenous regime's abolition, a juridical system having as goal the stigma of an ethnic group of a population in its own territory.

A clear paradox is that this stigma will evolve with the immigration of North-Africans in France after independence. Arabs will really undergo special rules aiming their religious identity. The access to citizenship by immigration launched, from 1990's, a generalisation of juridical stigma on Muslims, seen as second-rate citizens obliged to abandon a part of their religious identity to become fully French.

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[1] In Muslim schools of law, it is possible to ascribe the baby in his mother's womb to her husband, up to two years after the husband's death. In some schools, the delay can be to five years.

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