Panel 21

By what right? Power, legal norm and state in the Muslim world(s)

The law appears as a privileged and inseparable form of the modern state enterprise. In this, it informs representations within the political field both in terms of resources and stakes. This phenomenon is also prevalent in the Muslim world, as shown, for example, by the primacy attributed to the writing of constitutions in the wake of the Arab Spring. This panel will focus on the law as an expression of state power in Muslim-majority countries and the conflict it gives rise to. Our conception of law is emerging in opposition to a naturalistic view of what it should be. This naturalism takes the form of a 'legal orientalism' when it apprehends non-Western normativities exclusively by transposing the categories of analysis and functions of Western positive law. It also expresses an epistemological bias of a moral nature, when it considers law as a serious object only if it participates in the construction of a democratic project. The angle will be conceptual because it will be a question of proposing a more general reflection on the «right» object and its notional declinations. It will also be empirical, because these conceptual reflections will be discussed heuristically, i.e. in terms of their capacity to grasp in detail the reality of power and its uses of law in the Muslim world. Without being exhaustive, the following questions could be discussed: to what extent do state theory and constitutional theory help to understand political systems? what practical functions do actors assign to the notions that make up these theories (separation of powers, human rights, exceptional circumstances, constitution...)? does this allow for a rethinking of these notions? is law situated in texts or in its practical instantiations? what is the difference between a principle and a rule of law? The contributions may be of different types. They could be at a «meta» level and critically examine the understanding of law in the literature interested in politics in the Muslim world. They could also develop an analysis based on one or more empirically captured case studies as a starting point for conceptual reflection, or focus on the conceptual uses of the actors themselves and what they mean in context and action.

People in charge : Baudouin Dupret (CNRS) and Alexis Blouët (Université d'Édimbourg)
Discussant : Michel Troper (Université de Nanterre)

Program

Alexis Blouët (Université d'Édimbourg, Alwaleed Center)

The Heuristic Value of Constitutional Law Theory in Authoritarian Context.

Constitutional law is usually considered as non-relevant in authoritarian regimes on the ground that it does not constrain elites, which in reality act not legally but arbitrarily. Yet, constitutional law is also conceived as contributing to the state's organization and legitimation, which by itself is not incompatible with authoritarianism. Therefore, one can wonder if constitutional law theory could not help understanding the reality of authoritarian rule. This presentation intends to answer the question by analyzing the uses of constitutional law by elites in several countries of the Middle East. One perspective

is analytical and consists of studying which conceptions of constitutional law underpin these uses. The other is praxeological and observes how authoritarian elites use constitutional law theory to justify their practices.

Jean-Phillipe Dequen (Ministère des Relations internationales, Québec)

Grasp all lose all: the unusual incorporation of Muslim personal law into Indian positive law.

The advent of an independent Indian constitutional order in 1950 resulted notably in a dichotomy between 'law' and 'reality'; its principal architect, B.R. Ambedkar, thus not hesitating to assert that India was then «entering a life of contradiction». Indeed, in its very foundations, the Indian constitution does not aim to reflect the social order, its values and its morals, but on the contrary and through the law, to influence the latter. But while such a teleological conception expressly intends to reform Hindu law, Muslim personal law, a legacy of the British colonial era, is nevertheless deliberately ignored. The Supreme Court of India would confirm in the following years this real banishment of Muslim law from the positivist legal sphere, which, following the philosophy of Giorgio Agamben, is reminiscent of the position of the homo sacer, whose banishment is the basis of the legal sovereignty of the modern state. This deportation of Muslim law to a social and religious sphere is, however, contested, especially in the areas of divorce and maintenance. Faced with this dilemma, the Indian judiciary began, from the 1980s onwards, to slowly incorporate Muslim law into the Indian positivist edifice. The subsequent outbursts, notably through the cases of Shah Bano (1985), Danial Latifi (2001) and more recently Shayara Bano (2017), however, demonstrated a notable change in terms of legal logic. It is no longer a question of reforming Muslim law, but of interpreting it in such a way that it is, in essence, in line with the objectives of the Indian constitution. Islamic religious morality is no longer outside the 'law', but rather the raison d'être for its legal recognition. In embracing Islamic morality in this way, however, one may wonder whether Indian law is not stifling the legal otherness that is (or was) Muslim personal law.

Samer Ghamroun (USJ Beyrouth)

It's all about the state: conflicts of representations and meanings around the state in Lebanon
The state remains an omnipresent word in Lebanese society and politics. However, when legal and political professionals talk about it in their public discourses, they refer to very different, and sometimes contradictory, contents. This presentation will be about the plurality of the contextual meanings of the state in the contested field of family law in Lebanon, which is divided into a multitude of legal and judicial religious traditions, Christian as well as Muslim. These legal systems are regularly disturbed by competitive dynamics (between different religious laws and courts, and between religious and civil judges) or by social movements (mainly by women mobilizations demanding the secularization of family law, or religious law reform). This permanent controversy about the "content" of the state, which is often hidden behind other debates about different objects (like the family, the protection of the child, education policy, etc.), unveils activist configurations which often make secularism an essential condition of the existence of the state in Lebanon. The state will be secular or won't be. This political obviousness is rejected by alternative representations of the state which, while sometimes being politically dominant, use it to express other political imaginaries and strategies about law, family, the person, religion, and other issues that we will try to describe in this paper.

Eugénie Mérieau (Harvard)

Constitutional Litigation of Legal Pluralism : Sharia vs State in South East Asia

Around half of the 675 million people living in South East Asia are Muslims, including 230 million in Indonesia. Islam plays a central role in South East Asia, as a state religion (Malaysia, Brunei), a majority religion (Indonesia) or a minority religion (Philippines, Thailand, Burma). Legal pluralism prevails since independence as Sharia courts coexist with secular courts in line with constitutional rules. This presentation consists of a panorama showing the wealth of constitutional litigation dealing with the regulation of legal pluralism in the region. The presentation will analyze in details two themes dealing with religious freedom as recognized by constitutional rules:

- The theme of religious conversion through the case of Indira Gandhi v Pengarah Jabatan Agama Islam Perak (Malaysia, 2018)
- The theme of blasphemy through the Ahok case (Indonesia, 2018)