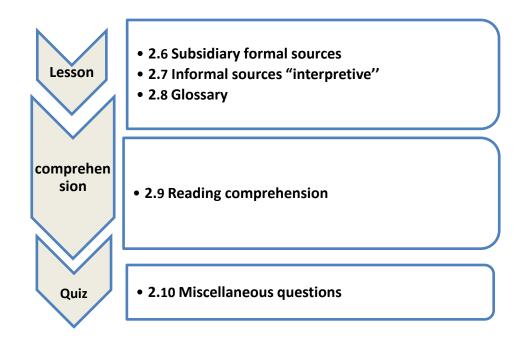
Lesson N°4



2.6 Subsidiary formal sources

A. The principles of Islamic law مبادئ الشريعة الإسلامية

The Algerian legislator put the principles of Islamic law in second rank, after "legislation", art1 of the civil code¹, these are principles inspired by:

- > The Quran,
- > The sunnah,
- > The consensus of scholars,
- \triangleright The analogy².

وضع المشرع الجزائري مبادئ الشريعة الإسلامية في المرتبة الثانية بعد "التشريع" مادة 1 من القانون المدني. هذه مبادئ ملهمة :

- ◄ القرآن
- ◄ السنة
- ◄ إجماع العلماء
 - ✓ القباس

B. The custom

Custom is the third source. It is a set of unwritten rules and generally accepted practices³. It is characterized by obligation unlike usage and tradition⁴.

C. The principles of natural law and the rules of equity

□ *Natural law:*

The legal dictionary defines natural law as follows:



¹ «Civil Code », *Opcit.*, p.1.

² فاضلي إدريس، المدخل الى القانون، "نظرية القانون، نظرية الحق"، ديوان المطبوعات الجامعية، ط2، الجزائر، 2016،ص. 131

³ فاضلي إُدريس، نفس المرجع، ص.133. ⁴ نفس المرجع، ص.136.

"The law is opposed to the positive law, which is the law in force, which is modified according to the evolution of morals. Natural law is the set of rights that individuals possess because of their belonging to humanity and not because of the society in which they live. Natural law, which includes in particular the right to life and health and the right to liberty, such as the right to property, is inherent to humanity, universal, and unalterable, even though there is no concrete way to enforce it.⁵ ".

By "natural law" we mean the right inherent in human nature; it is not positive law whose sources that contribute to its formation are multiple, but it is a law whose unique source is human nature. This law pre-exists the legislator⁶. Ex. Principle of freedom: Man is born free, this means that the individual as a human being is born with rights. These rights were not invented by positive law.

Natural law, although it differs in its origin from positive law, is nevertheless not opposed to the latter but rather complements it; moreover, the legislator invites the judge to resort to natural law and the rules of equity in the absence of any provision in the preceding sources. (Legislation, principles of Islamic law and custom⁷).

نعني بـ "القانون الطبيعي" القانون الملازم لطبيعة البشرية ، فهو ليس قانونا وضعيا تتعدد مصادر تكوينه ولكنه قانون مصدره الوحيد الطبيعة الانسانية ، وهذا القانون سابق على المشرع.

مثال: مبدأ الحرية: يولد الإنسان حراً ، وهذا يعني أن الفرد كإنسان مولود بحقوق. هذه الحقوق لم ينشئها القانون الوضعي.

☐ The rules of equity

If the judge does not find among the sources cited above a basis on which he can rely to decide a dispute⁸, he must resort to the rules of equity.

Equity is a flexible concept that changes depending on the situation. Among the concepts that have been given to equity, there is the necessity of pronouncing the **same** judgment for equal cases and a **different** judgment in unequal cases⁹.

إذا لم يجد القاضي الأساس الذي يعتمد عليه في الفصل في النزاع في المصادر المذكورة سابقا، وجب عليه اللجوء إلى قواعد العدالة. العدالة مفهوم مرن يتغير حسب الموقف.

من بين المفاهيم التي أعطيت للعدالة: ضرورة إصدار نفس الحكم في القضايا المتساوية وحكم مختلف في القضايا غير المتساوية.

⁵Serge Braudo, « Définition de Droit naturel », Dictionnaire juridique, disponible en ligne, [En ligne]URL : https://www.dictionnaire-juridique.com/definition/droit-naturel.php

⁶ Philippe Malinvaud, Introduction à l'étude du droit, LexisNexis, Paris, 2013, p.28.

⁷ Art1 du code civil.

⁸ Broad definition: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of. interests between two persons.", Christoph Schreuer, "What's legal dispute?",

⁹فاضلي إدريس، نفس المرجع، ص144.

المصادر غير الرسمية "تفسيرية" « Informal Sources « interpretive »

By "interpretative sources," we mean the sources that help to interpret a legal rule; in this case, they do not create the law, but they provide assistance to the one who applies it to correctly forge the meaning intended by the legislator and then decide according to what is right.

نقصد بعبارة "المصادر التفسيرية" المصادر التي تساعد على تفسير قاعدة قانونية ، وفي هذه الحالة لا تنشئ القانون ولكنها تساعد الذي يطبقه في تشكل المعنى الصحيح لديه، أي الذي يقصده المشرع ، ثم يقرر حسب القانون.

A. The case law/judicial Precedent الإجتهاد القضائي

These are rulings and judgments rendered by the different courts, and they are supported by the hight courts¹⁰ (Supreme Court and the Council of State, in Algeria)¹¹. These courts, by ruling on disputes, put in place modes of interpretation for the correct and easy application of legal rules. If this interpretation is frequently followed and generalized, it becomes an interpretive source.

The Algerian legislator invites, through the constitution in its Article 179, the Council of State and the Supreme Court, to unify "efforts of interpretation" in order to avoid the disparity of judgments and rulings in a given matter, as he says: "The Supreme Court and the Council of State ensure the unification of the interpretation across the country and ensure compliance with the law. ¹²".

What must be noted here is that the importance and nature of case law and its position differ from one legal system to another. If it is considered in Algerian law as an informal and interpretative source, it is not so in other legal systems, such as that of United Kingdom¹³, where "The judicial precedent" "السابقة القضائية" is considered as a primary source of law¹⁴.

We also say "common law" which means the customary law of United Kingdom emanating in particular from case law¹⁵.

"Common law is a law that is not written. It has over time become a set of rules based on precedent, that is, rules that guide judges who are later called upon to make decisions in similar cases. This law is not found in any "code". It only exists in previous decisions. But at

^{160.}ص.2010، الجزء الأول، ديوان المطبوعات الجامعية، ط. 11 أنوفمبر 2010، مس. 160. المطبوعات الجامعية، ط. 11 أنوفمبر 2010، مس. 160. المعيد بوالشعير ، القانون الدستوري والنظم السياسية المقارنة، الجزء الأول، ديوان المطبوعات الجامعية، ط. 160. Durnal des traducteurs, Translators' Journal, La "Common Law", Volume 7, numéro 2, 2e trimestre 1962, Les Presses de l'Université de Montréal, p.66.



M. Arihir, last updated on November 21, 2023

¹⁰ University of Melbourne, "United Kingdom Law", available [online]URL :https://unimelb.libguides.com/c.php?g=925964&p=6688470#:~:text=Case%20law%20(or%20judicial%20prece dent,to%20the%20doctrine%20of%20precedent, Acceded November 10, 2023.

11 محمدى فريدة، المرجع السابق، ص ص 98-98

¹² « Constitution », décrit présidentiel, n°20-442, qui relève de l'amendement de la constitution, Journal Officiel de la République Algérienne, N° 82, 30 décembre 2020, Alger, p.38.

¹³ Kiralfy, Albert Roland, Glendon, Mary Ann and Lewis, Andrew D.E.. "common law". *Encyclopedia Britannica*, 4 Jul. 2023, https://www.britannica.com/topic/common-law. Accessed 02 November 2023.

the same time, it is flexible and adapts to changing circumstances because judges can establish new doctrines or change previous ones 16,7.

الإجتهاد القضائي:

هي القرارات والأحكام التي تتخذها مختلف المحاكم بحكم التقاضي مدعومة بالمحاكم العليا ، تضع أساليب تفسير للتطبيق الصحيح والسهل للقواعد القانونية ، وهذا الإجتهاد في التفسير إذا تمت متابعته بشكل متكرر يتعمم بعد ذلك ويصبح مصدرًا تفسيربًا.

يدعو المشرع الجزائري ،من خلال الدستور في مادته 179، مجلس الدولة والمحكمة العليا إلى توحيد الإجتهاد القانوني لتجنب تباين الأحكام.

ما يجب الإشارة إليه هنا، هو أن أهمية وطبيعة السوابق القضائية وموقعها يختلف من نظام قانوني إلى آخر ، إذا كانت تعتبر في القانون الجزائري مصدرا غير رسميا وإنما تفسريا، فهي ليست كذلك في النظم القانونية الأخرى مثل النظام القانوني، حيث أن "السابقة القضائية" تعتبر مصدرا اساسيا للقانون.

ونقول أيضًا "القانون العام" "common law"، وهو ما يعني القانون العرفي للمملكة المتحدة المنبثق بشكل خاص من السوابق القضائية.

"القانون العام هو قانون غير مكتوب. وأصبح مع مرور الوقت مجموعة من القواعد المبنية على السوابق، أي القواعد التي يسترشد بها القضاة الذين فيما بعد يتخذون قرارات في قضايا مماثلة. هذا القانون موجود فقط في القرارات السابقة. ولكنها في الوقت نفسه تتسم بالمرونة وتتكيف مع الظروف المتغيرة لأن القضاة يستطيعون إنشاء مذاهب جديدة أو تغيير المذاهب السابقة

B. The jurisprudence

According to Cambridge dictionary, the jurisprudence is "the study of law and the principles on which law is based¹⁷".

"In the United States, jurisprudence commonly means the philosophy of law. Legal philosophy has many aspects [...] It seeks to analyze, explain, classify, and criticize entire bodies of law.¹⁸"

The purpose of the jurisprudence is to make the law known, to highlight the failures of the legal system, to interpret the law and case law. Jurisprudence plays a fundamental role because it can exert an influence on both the judge and the legislator¹⁹.

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¹⁶ Ministère de la Justice Canada, « L'origine de notre système juridique », 2021-09-01, available [online]URL : https://www.justice.gc.ca/fra/sjc-csj/just/03.html, Accessed 02 November 2023.

¹⁷ Cambridge Dictionary, 2023, "jurisprudence", available [online]URL:

https://dictionary.cambridge.org/dictionary/english/jurisprudence, Accessed 02 November 2023.

¹⁸ Legal Information Institute, CORNER LAW SCHOOL, "Jurisprudence", available [online]URL: https://www.law.cornell.edu/wex/jurisprudence, Acceded November 10, 2023.

¹⁹ Philippe Malinvaud, *op.cit.*, p.192

The term jurisprudence designates all legal opinions and works devoted to the study of law. This term also designates the authors of this work who are mainly academics but also practitioners such as judges^{20.}

ملخص بالعربية:

الفقه ٠

الفقه هو "دراسة القانون والأصول التي يقوم عليها القانون".

في الولايات المتحدة، الفقه يعني عادة فلسفة القانون. الفلسفة القانونية لها جوانب عديدة [...] فهي تسعى إلى تحليل وشرح وتصنيف وانتقاد مجموعات كاملة من القوانين.

الغرض من الفقه هو جعل القانون معروفًا ، وتسليط الضوء على أوجه القصور في النظام القانوني ، وتفسير القانون و الإجتهاد القضائي، و يلعب الفقه دورًا أساسيًا لأنه يمكن أن يؤثر على كل من القاضى والمشرع.

يشير مصطلح "الفقه" إلى جميع الأراء القانونية والأعمال المكرسة لدراسة القانون، وكذلك إلى مؤلفي هذا العمل، وهم أكاديميون بشكل أساسي ولكنهم أيضًا من الممارسين للقانون: مثل القضاة.

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²⁰ *Ibid.*, p.p.192-193.

2.8 Glossary

Т	ns used in Lesson	
Ierm	ne licea in Leccan	
10111	ns used in Lesson	

N°	المصطلح بالانجليزية	المصطلح	N°	المصطلح بالانجليزية	المصطلح بالعربية
		بالعربية			
1	Civil code	تقنين مدني	13	Commun law	قانون عام، مشترك "قانون
					عرفي"
2	Principales of islamic	مبادئ الشريعة	14	Dispute	نزاع
	law	الاسلامية			
3	Quran	القر آن	15	Interpretation	تفسير
4	Sunnah	السنة	16	Legal system	نظام قانوني
5	Consensus of scholars	إجماع العلماء	17	Council of State	مجلس الدولة
6	Analogy	قياس	18	Supreme Court	محكمة عليا
7	Custom	عرف	19	Judge	قاضي
8	Naturel law	القانون الطبيعي	20	Jugement	حکم
9	Rules of equity	قواعد العدالة	21	Ruling	قرار
10	Positif law	قانون وضعي	22	philosophy of law,	فلسفة قانون
				Legal philosophy	
11	Case Law	اجتهاد قضائي	23	Jurisprudence	فقه
12	Judicial precedent	سابقة قضائية	24	Legislator	مشرع

2.9 Reading comprehension

TEXT

"Although most laws are enacted by Parliament in the form of legislation, in a common law system such as ours the courts can also develop the law. By deciding a disputed point of law a senior court (known as a court of record) can change or clarify the law, thereby setting a precedent which other courts are bound to follow or apply in later cases.

By publishing and indexing law reports, ICLR²¹ ensures that people can easily find and learn about the cases that have changed or clarified the law over the years, how they have affected earlier cases or interpreted legislation, and whether they have been overtaken by later cases on the same topic.²²"

QUESTIONS

1	Give	a title	to this	text
	i. Chve	a me	TO THIS	TEXT.

- 2. What can we understand by the term "senior courts"?
- 3. By what means can the senior courts change or clarify the law?
- 4. What's the point of ICLR?

Answers

²² https://www.iclr.co.uk/knowledge/case-law/what-is-case-law/



²¹ Incorporated Council of Law Reporting for England and Wales together with a vast archive of unreported judgments and indexed case information.

2.10 QUIZ:
Question 1:
The Algerian legislator put Sharia law in second rank, after "legislation"
Select one: True False
Question 2:
The principles of the Muslim religion aren't inspired by:
Eliminate the incorrect answer
A. Quran
B. Consensus of scholars
C. Sunnah
C D. Moslem History
© E. Analogy
Question 3:
Custom:
Select one or more :
A. General and frequent accepted practices
B. is characterized by obligation unlike habit or traditions



C. is the third source according to civil code			
D. is the set of unwritten rules not developed by the legislative power			
estion 4:			
tural law is inherent in human nature and pre-exists the legislator.			
lect one: True False			
nestion 5:			
he judge does not find among the legislative texts a basis on which he can rely to decide a pute, he must resort secondarily to the rules of equity. Select one: True False			
estion 6:			
l in the blanks by choosing the missing words and expressions in the following paragraph m the list: interpreting, provide assistance, meaning intended, the source, create			
"interpretative sources" we mean[[
nestion 7:			
l in the blanks by choosing the missing words and expressions in the following paragraph m the list: correct and easy, interpretation, Rulings, supported by, put in place, judgments,			
e case law is manifested in [[

Question 8:
The importance and nature of case law and its position do not differ from one legal system to another
Select one: True False
Question 9:
"The precedent" is considered the primary source of law in the British legal system.
Select one: True False
Question 10:
The jurisprudence is a case law
Select one: True False