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The Concept of Jurisprudence in Algerian Law

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ABSTRACT: After its independence (1962), Algeria opted for a legal system of written law attached to the Roman-Germanic family. The young republic was to generate legal innovations of which the concept of *jurisprudence* was to be the witness. Our contribution attempts to evaluate the concept of jurisprudence through its legal thought of French law and as defined and conceived in the tradition of the Muslim legal doctrine that was present in Algeria before and during colonization. This will give us the underline the importance of *nawazil*, a kind of "ruling jurisprudence", where the *massail* (cases) and the motivation of the resolutions of these cases are recorded. These written collections of several great Maghrebian jurisconsults inspired the decisions of the *qadi* (judge) in order to render the most just, equitable and rational justice possible. The place of *nawazil* in the practice of *qadat* (judgment) that existed in Algeria before and during colonization will allow us to shed light on the place of jurisprudence in Algerian law – a very poorly documented issue, indeed. An overview of the historical evolution of the legal systems that coexisted for a long time during this period will prove to be very useful.

KEYWORDS: jurisprudence, Algeria, nawazil, qadat, Muslim law

Introduction

Algeria, a country located geographically to the north of the African continent, has evolved in the Arab-Muslim legal doctrine known as "Malikite" for more than ten centuries. Following its independence from France in 1962, it maintained the French legal system of written law, attached to the Romano-Germanic family. However, the young republic is still faced with the adoption of a legal system bequeathed by a colonization of 132 years but which is superimposed on an Arab-Muslim heritage. This hybridization will manifest itself in the notion of *jurisprudence* which we will discuss in what follows.

J.P. Andrieux (2012, 10) defines jurisprudence as fluctuating over the centuries, it presents itself as a gift that each era receives and adapts. This variation seems to take hold of the very definition of *jurisprudence* as well as its role in different legal systems through its evolution. It encompasses, in fact, the notions of *knowledge*, *science*, even *reason* to be restricted from *jurisprudential solutions,* in contemporary law.

Jurisprudence in Algeria: an ancestral tradition

Long before the French occupation, there was a legal institution, the *cadat*, inherited from the Arab-Muslim Maghreb (from the 7th to the 15th centuries) and from its legal doctrine. This institution was maintained even during the Ottoman reign (1512-1830) when justice was entrusted to the representatives of the sultan (*Dey, Bey, Pasha)*. The latter were delegated in criminal matters by the *Qaid* and the *Agha* (Laugier de Tassy, 1725) and in civil matters by the Cadis. Two main rites served as a guide: the *Malikite* and the *Hanafite* (Emile Tyan, 1968, 155). This delegation, source of political power, confers on the cadi, judicial and extrajudicial attributions: he was at the same time notary, executor, curator, civil registrar, protector of incapable persons, responsible for the division of inheritances, administrator of habous property (properties managed by an institution), inspector of streets and buildings, supervisor of witnesses and trustees. L. Horre (1934, 24) qualifies such attributions of “universal jurisdiction.” We will only retain the competences of rendering justice which is the object of our analysis.

The rules of Muslim legal doctrine impose themselves as a source for the *cadi* responsible for judging disputes under his responsibility. Two of these rules will be discussed. (1) the "knowledge of legal science", one of the seven conditions of aptitude for judicial office; (2) the *Ijtihad* (jurisprudence) methods of rendering justice – and this rule responds to the concern of our present study.

The capacity of ijtihad

According to the *fikh* doctrine, the knowledge of legal science implies knowledge of the permissible (lawful), the forbidden (the illegal) and the science of the roots of law. The later include the *Koran*, the *sunnah* (tradition of the Prophet), the exegesis of the *Koran* and the *sunnah* according to the rules of *ijmaâ* (the interpretation set by the oldest). To this knowledge, we must add the science of analogy (*al-qiya*s) which makes it possible to decide when difficulties arise which do not present any solution, neither in the *Koran*, nor in the *sunnah* or *Ijmaa*.

This knowledge is presented by a large number of Muslim authors as a condition of investiture to the *cadat*. Al-Mâwardî (eleventh century) insists particularly on the knowledge of legal science. The latter not only involves knowledge of the texts, but also the ability to deduce, by the orthodox method of reasoning, the appropriate solutions; this is called the ability of *ijtihad* (to become *mujtahid*). According to Al-Mâwerdî (E. Fagnan, 1915) the very appointment of a non-mujtahid cadi is automatically null, as are its judgments. Thus, M. Daoualibi (1941,7) argues that “Islamic jurisprudence can be taken from the habit of judging a question in such and such a way, and from the interpretation of the law.".

Literally, *ijtiad* (jurisprudence) is the effort made by means of inductive reasoning by the *cadi* to provide solutions to new questions; which are not mentioned either in the *Koran* or in *Sunna* as noted by Bazdawi (1890, 14). The Arabic word *Ijtihad* derives from the root *Ijtahada* which means "to make an effort". We say "Ijtihada ra'iahou", which means "to force your reason to put all your efforts". It happens that the term ha synonyms such as: *ra’i* (reasoning), *aâql* (reason), *qiyas* (inductive reasoning).

Finally, we will underline the role played by philosophy which rationalized the *ijtihad* through the thought of Ibn Rusd (Avéores), jurist and Andalusian cadi of the 12th century. We ow him the translation of *al-qiyâs* by “logical interpretation”. From his *Bidaya* - cited by Langhade, D. Mallet, (1985, 114), his work can be matched with: "the logical argument in contradiction with the fact"; "the incompatibility between the letter and the spirit of the law"; "the reconciliation between text and logic".

However, two rational and traditional tendencies emerge and lead to dividing jurisprudence (*ijtihad*,) into two main schools, according to (Al-Khoudari, 1999): the Iraqi school, having Abu Hanifa for founder, and the school of Hedjaz, having for founder Malik Ibn Donkeys.

The Hanafi school bore the imprint of the rational school taught by Ibn Mas’ud Abu Hanifa. He had the reputation to favor abundant discussions and free reasoning which he practiced unceasingly, in his classes and with his disciples. He pushed quite far inductive reasoning, and developed the Koranic and prophetic principles with a rigorous concern for logic. This is particularly noticeable in the application of the principles of *fairness* and *good faith*; principles that we will find later in the reasoning method of French judges in Algeria.

The Malikite school, for its part, begins in Medina, the seat of the Prophet. Malik Ibn Anes (d. 795) sets up an organized legal system. From his treatise *Mwatta*, derives a jurisprudence based on the "tradition" of the Prophet, which intervenes as a legal "argument". It deals with worship and general law. This school is attributed a “traditional” characteristic.

We will retain that it was Malikism that spread more particularly in Maghreb and Andalusia, due to the fact that it was Malik's disciples who were the most active there, from the end of the 8th century. M. Ghalem (*2006, 31*) mentions the Kairouanese Sahnûn (died in

854) who wrote a great work entitled *Mudawwana*, in which he explained the content of the *Mwatta* of Malik. In the tenth century, Ibn Abî Zayd al-Qayrawani wrote another important Malikite text called the *Risala*, which was more accessible, referring to *ra'y*, that is to say the possibility of choosing between the opinions previously expressed by the authorities to resolve this or such case.

Doctors of Muslim law consider that the rules of all its schools, taken as a whole, constitute a science called "the science of the sources of law". The jurisprudence, *ijtihad*, conceived in Islamic law, presents an entirely new character in the history of jurisprudence. This is why L. Horrie (op cit, 36) amazingly wrote about the *cadis* of this time: “The *cadi* is eminently what was the *praetor* among the Romans, a judge no doubt, and more than a judge: a sort of empirical legislator; a living embodiment of justice, right and law. "

Doctors of Islam distinguish (M. Daoualibi, op cit, p 113), in the field of jurisprudence, between interpretation, *al-bayan*, and inductive reasoning, *al-qiyas*. The first tends to clarify the meaning of the text in play to know if it could frame the question asked, while the inductive reasoning tends to identify the determining causes of the solutions mentioned or to clarify the spirit of the law, which offers principles of justice helping to resolve the question posed.

The role of the Nawâzil

Unlike Middle Eastern jurists, Maghrebian and Andalusian jurists keep records of jurisprudential cases by noting collections of legal consultations issued by jurists. Thus, between the 10th and the 15th centuries, consultations on concrete and unprecedented cases which make jurisprudence, were gathered in collections known as “Nawâzil”.

According to a study conducted by Muhamed Ben El Hassen Elhajoui Eltaâlibi El Fassi, the tradition of the Nawâzil went through three periods. The first period, between the 9th and 10th centuries, saw an abundance of case law and legal consultations. The second period from the 11th to the 14th centuries is known to be the period of the transcriptions of the Nawâzils, which allowed the birth of a science called "fikh el nawâzil" defined as a science of application of the *fikh*. This is the applied scientific aspect of theoretical jurisprudence.

This science is characterized by realism because it deals with typical cases of facts already produced and by the proportionality of judgments linked to its local character. It is also characterized by its continuous renewal due to the principle of *Ijtihad* and deduction. One can say that such an intellectual operation represented a continual challenge to the *cadi*.

The researcher Maria Jesùs Viguera, quoted by P. Guichard (1999, 49-50), estimates the number of these collections of legal consultations at 83 Nawâzil. To take just a few examples, let us mention the most accessible, as is the case with *Mi’yâr* of al-Wansharîsî which contains more than 2.000 summaries of legal consultations issued by Maghrebian and Andalusian doctors, between the tenth to the 15th century. Let us also mention the *Nawâzil Mâzûna* of Abû Zakariyyâ 'Yahyâ Ibn Abû' Umrân Mûsâ Ibn 'Îsâ al-Maghîlî al-Mâzûnî (died in Tlemcen in 1478). This book edited at the end of the 15th century is a collection of fatwas issued by jurists from Tunis, Bougie, Algiers and Tlemcen. Nearly three quarters of these fatwas date from the 14th and 15th centuries.

This is how legal thought was presented in Muslim law applied by the *cadis* of the Maghreb, of which present-day Algeria was part through its history. A thought and methods of rendering justice, which continued to evolve through the main actors, the *cadis*, and through the trainers of the latter. Of all these historical facts, we can remember the interest given to the instruction of the *cadis*. All had to fulfill the condition of knowledge of legal science and the ability to issue opinions on interpretations (*ijtihad*) when a new case not studied in the jurisprudence of the four Imams presented itself to them. In our opinion, the

decline of this case law, a legacy of more than ten centuries, is rooted in the integration of the *cadat* into the French judicial system.

The reasons for the decline of the jurisprudence of the cadis during colonization

Colonial France (1830-1962) defended the principle of substitution of local laws to French laws as soon as a country was annexed to it. This principle of assimilation was not applied at the start of the conquest of the Algerian population. France chose rather to defend the cohabitation between the judicial institutions in place of the *cadis*, the *djamaâ* Kabyle or Mozabite and the *rabbis* and the ones it was gradually putting in place. According to the analysis of Ch. Roussel (1876,3), the cultural differences of the Algerian population that forwarded this decision.

From this duality of judicial institutions, it follows that, apart from the laws of public order which were applicable to all, the laws of private right were subject to the jurisdiction and the law of each community (Muslim, Kabyl, Mozabite, Jewish).

In the continuity of the historical development of judicial institutions, another form of justice is being set up, a "justice of peace with extended jurisdiction". It was entrusted to a French judge who was required to rule in accordance with the law and customs of each community. We will consider, in respect of the limits of our presentation, two main reasons: (1) the cohabitation between several institutions and endless reforms; (2) the intellectual capacities of the various judges.

The integration of the *cadat* into the French judicial system

The ordinance of August 10, 1834 integrates the *cadi* into the framework of French justice and its ministry of justice, and provides that the judgments of *cadis* are subject to appeal to the Court of Algiers. The ordinance of September 26, 1842 on the organization of justice in Algeria requires *cadis* to judge in the name of the King of the French.

However, the integration of the *cadis* brought about a separation later on (decree of the executive power of August 20, 1848) and the justice of the *cadis* was attached to the Ministry of War. This desire for separation between French justice and Muslim justice is concretized by decree of October 1, 1854, under the emperor Napoleon III as noted by L. Horrie (op. Cit., 93). The territory was divided into constituencies of *mahakmas* (courts) to ensure the execution of decisions. This gave the *medjless* jurisdictional sovereignty of appeal, when it only had an advisory opinion. In addition, a Superior Council of Jurisconsults was created.

These changes gave rise to a broad protestation on the part of certain French jurists who considered the independence of Muslim justice as an "error," F. Godin (1900). The decree of December 31, 1859, re-establishes the connection of the Muslim institution to French justice and withdraws from the *medjless*, the power of appellate jurisdiction, without suppressing them (it recovered its advisory opinion), and puts the appeal to the jurisdiction of the Court of Algiers.

A little later, the decree of 1866 marked a new milestone in the history of justice in Algeria. This decree reviews the organization of justice for the *cadis* (their status, their recruitment, the rules for their advancement, etc.), but even more, proposes a new form of jurisdiction option for Muslims: recourse to justices of peace which abide to the norms of Muslim law. These judges come into competition with the *cadis*. In addition, the decree of November 11, 1875, abolished the Superior Council.

The powers of the *cadis* are revised several times by restrictive measures. The *cadi* is reduced to a simple judge of exception; a loss of powers which will be confirmed by the law of August 4, 1926, and the ordinance of November 23, 1944. These last ordinances once again offer to the Muslim litigant the option of jurisdiction and legislation, therefore the choice to seek justice to the justice of peace on matters hitherto reserved for the jurisdiction of the *cadi*.

The number of *cadis* is restricted, and their fields of competence lack clarity. According to Sefta (2005, 297), it is due to "applying a law that has become theoretical." To this one should add the new reorganization of justice and its auxiliaries (the ordinance of April 10, 1843, declares the code of civil procedure applicable to Algeria and creates notaries and bailiffs): which creates the functions of notary, notary clerks, and bailiff. The *cadis* end up losing notarial and enforceable powers (law of December 30, 1959).

The conditions of investiture to the *cadate* during the colonial period

To meet the need to consider the *cadis*' intellectual potentials during this period, one should account for the extent of the power of intervention of these judges, of their competence, and of their methods of rendering justice.

As the jurist and sociologist J.P. Charnay (2005) already observed in a study (1963, 716) devoted to the role of the French judge in the development of Algerian Muslim law, published in, an explanation of the evolution of jurisprudence could be found in the very training of these magistrates. Such as the knowledge and ability of the *Ijtihad* (already mentioned), gradually lose their strength during the French occupation. The French authorities tried to regulate the status of the *cadi* (decrees of December 13, 1866, and those of 1886 and 1889). But it is curious to note that, in the choice of the latter, the elementary conditions were deliberately neglected, hence a progressive decline of his competence.

The question of the link between the competence of the *cadi* and the quality of his interpretations was raised by a large number of judges. One of them, C. Frégier (president of the court of Sétif in 1862) notes in his pamphlets (1862) "the considerable interest attached to the choice of *cadis*, both for the good of the indigenous populations and for the future of Algeria, of Muslim justice and of its influence." This judge did not fail to express his indignation at the disinterest of the French power to the conditions of access to the Muslim magistracy.

The decadence of the cadis was such that many other Muslim jurists reacted. In a report addressed to the governor general on June 6, 1934, the cadi Ben Habylés (Senator of Constantine from 1951 to 1959, he also exercised the function of cadi notary in Drael-Mizan), reacted to this degradation. The outrage continued despite a significant number of reforms. The *cadis* were reduced to simple officials of the French state, their appointment was under the responsibility of the minister of Algeria.

Sefta, who was a *bach'adel* (clerk) in the Mahakma of Algiers-Sud, underlines the extent of the difficulty of living in Algeria at that time and links it to "the suffering of the organization of Muslim justice". However, the cadis did not cut themselves off from legal life, they organized themselves into an association (the Association of Cadis of Algeria) and expressed their fears that the reform of Muslim justice would constitute a definitive abolition of their powers. Algeria's colonial justice system continued to evolve during more than a century of occupation. From 1870, the Algerian judicial organization got more and more modeled on that of France.

Conclusion

Independent Algeria has chosen a legal system of written law. In this type of system, it is according to the law and in respect for the principles of legality and equality that the judge must resolve disputes.

These principles, so much advocated and dear to the Arab Muslim jurisprudence have been reinforced by the latest Algerian Constitution (2020) in the provisions of article 140 which provides "justice is founded on the principles of legality and justice. It is equal for all, accessible to all and is expressed through respect for the law." Legality is thus associated with

justice because it must promote certain values which justify the role it is given, the reference of the obligation to judge.

This obligation, which is part of the exercise of the office of judge more than half a century after independence, extends this laborious march of the judge "cadi of another time". When the judge rules, in the event of silence or insufficiency or lacuna in the law, he/she rules according to a standard, a principle. The solution given can only be the expression of a value judgment, the expression of a preference, the recognition of a certain form of fairness, the content of which would be reflected in its motivation. Motivation guaranteed by the constitution in article 144: “court decisions are motivated and pronounced in public. Judicial orders are motivated."

This post-independence case law, in our view, is part of the course of jurisprudence that echoes the needs and interests of society. It still thrives, as it did before, in the midst of what A. Mahiou (2008) called "a singular right", qualified, in another era, as "complex law." We should therefore be careful about all this in the future, because the independence of the judge is important in all respects and it is not a question of leaving one addiction to fall under another."

Finally, and to close our present contribution, we cannot resist to the desire to appeal to this quote from Ferrière, in 1769, bout jurisprudence: "We should therefore not be surprised if reason makes us regard jurisprudence as the human society’s firmest support and beautiful ornament."

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