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Customary Judiciary in Algeria A Study of the Document on Customary Provisions and Regulations - Ben Badis Mosque as a Model –

القضاء العرفي في الجزائر دراسة لوثيقة الأحكام والضوابط العرفية مسجد بن باديس نموذجا

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Abstract:

The research aims to redefine tribal judiciary by analyzing judges' evidence and integrating it with Sharia rulings that conform to Sharia law's framework. It explores rulings without explicit legal references, considering the contextual dynamics of time and place. The study seeks to clarify its rulings and their relevance in contemporary judicial legislation, both theoretically and practically.

Through this research, I will attempt to investigate methods for the continuity of customary legislation and judicial rulings, in order to meet the needs of the fields in which it operates. After people have seen it as a way to preserve the dignity of others and deliver rights to their rightful owners through the shortest and fastest means possible.

So, is customary reconciliation the original basis for dispute resolution, or is it a collision with legal texts and rules?

Keywords: Council, Custom, Provisions, Islam, Sharia, Judiciary.

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الملخص:

يهدف هذا البحث إلى إعادة صياغة مفهوم القضاء العشائري من خلال العمل على استقراء الحكم الشرعي واستنباطه من أدلته، سواء كان هذا الاستنباط يتم ضمن إطار التقنين التفصيلي للأحكام الشرعية أو من خلال استخراج الأحكام غير المنصوص عليها بناء على قواعد مرجعية واضحة ومحددة بما يتناسب مع معطيات الزمان والمكان، مع تحديد أطر هذا النوع من القضاء والمجالات التي يطبق فيها ضمن السياق الحالي للتشريعات القضائية الحديثة، سواء في التقنين أو التطبيق.

سأحاول من خلال هذا البحث استكشاف السبل التي تمكن التشريعات والأحكام العرفية من الاستمرار والتطور، بحيث تظل قادرة على تلبية احتياجات المجالات التي تطبق فيها، فقد أثبتت التجربة أن القضاء العرفي يعتبر أداة فعالة للحفاظ على كرامة الأفراد وحفظ الحقوق بأبسط الطرق وأكثرها سرعة.

يبقى التساؤل المطروح: هل يعتبر الصلح العرفي الأصل في حل النزاعات، أم أنه يتعارض مع النصوص والقواعد القانونية المعمول بها؟

الكلمات المفتاحية: مجلس، عرف، أحكام، الإسلام، شريعة، قضاء.

1/ Introduction

In Algeria, litigants often resort to customary courts alongside the regular judiciary. This preference stems from the unique advantages of tribal courts, such as their ability to resolve cases quickly and efficiently, ensuring that both parties involved leave with satisfactory solutions while also feeling secure and protected.

This is achieved by setting up tribal guarantors who aim to prevent conflicts and soothe the involved parties and their supporters through friendly negotiations. This tribal judiciary also tackles the emotional impacts of disputes and the lingering resentments between those involved by working towards final decisions or solutions that address the issues materially, psychologically, and morally.

The role of the tribal judiciary is quite similar to that of the regular judiciary, as it involves monitoring and diagnosing situations, making it a complementary and supportive force to the regular judicial system.

The significance of tribal justice really hinges on the integrity, competence, and strong morals of its members, along with their persuasive abilities. It's clear that the trust citizens place in this system

comes from the fact that those administering it are everyday people who share the same community as the parties involved in disputes.

There are plenty of positive examples and rulings out there that highlight the valuable role tribal justice plays, accessible to researchers and scholars alike.

While traditional customary institutions play a significant role in people's lives, the legal reality often feels worlds apart from them, as they aren't officially recognized within the Algerian legal framework. Despite this disconnect, these institutions are crucial in managing the legal affairs of individuals, contributing to social order, fighting crime, and peacefully resolving disputes.

These days, there's a growing interest in alternative dispute resolution methods within legal studies. Yet, it seems that customary councils remain largely overlooked by specialists. They often don't get the recognition they deserve as a legitimate way to resolve disputes, and their valuable role in helping judicial bodies fulfill their duties is frequently overlooked.

This may be due to the fear of diminishing the authority and color of the regular judiciary . Instead, they often turn to customary judiciary, which is easier to access and for its speedy action in resolving disputes.

In some regions, customary councils hold significant sway, as citizens tend to respect them out of fear of social repercussions, which can feel more threatening than the penalties imposed by the state. This dynamic leads individuals to regard customary law with more respect than international law.

The Study Problematic:

Given the above considerations: *Is customary reconciliation considered the foundation for settling disputes, or does it contradict legal texts and regulations?*

The Study objectives:

The aim of this study was to shed light on the role of customary councils in the reconciliation process. It sought to emphasize the key

positive aspects of these councils while also pinpointing their shortcomings and areas where they fall short.

Additionally, the aim of this research was to illustrate the function of customary councils in the reconciliation process, emphasizing the key positive features of these councils, and pinpoint their limitations and weaknesses, along with the degree to which they conflict with legal documents, especially the "Ben Badis Mosque Customary Provisions and Regulations Doc", which were enacted on December 30th, 2017.

Methodology:

In exploring this topic, I plan to take a descriptive and analytical approach. I'll dive into some key legal texts and compare them with the Qur'an and the Customary Provisions and Regulations. This comparison will be crucial in helping us tackle the problematic at hand.

2/ The Objective Guarantees

Islamic law has laid out a thorough understanding of human rights within a new state framework,[1] specifically a state governed by Sharia law. This means a legal system that stands on solid foundations and guarantees, starting with a constitution that serves as the guiding reference for both authority and individuals.

The constitution regulates authority and imposes restrictions for the benefit of human rights, incorporating them into legal rules, ensuring that the administration adheres to the law, recognizing individual rights and freedoms with guarantees for their realization, establishing a separation of powers, organizing judicial oversight, and determining the principle of selecting, monitoring, and dismissing the ruler.[2]

Judicial fairness in society relies on two key types of guarantees: substantive guarantees and procedural guarantees.

2.1. The Objective Guarantees in Islamic Law and Customary Councils

The societies that shaped their laws in ancient times drew their ideas and principles of justice from a common wellspring: reason and an innate sense of justice within the human spirit. Yet, this foundational

source manifested in various ways across different cultures. In Islamic law, for instance, the essence of justice continues to be rooted in reason and the wisdom found in Islamic teachings (God's Divine nature).[3]

2.1.1. The Principle of Legality

Islamic law was actually the first to lay down this crucial principle -*nulla poena sine lege*-. Sadly, many scholars focused on positive law either overlook or are unaware of this fact, often crediting this principle to the French Revolution that occurred at the end of the eighteenth century.[4]

This is confirmed by the fact that this principle has been mentioned in definitive Islamic legal texts, including the words of God Almighty: "*Whoever chooses to be guided, it is only for their own good. And whoever chooses to stray, it is only to their own loss. No soul burdened with sin will bear the burden of another. And We would never punish ˹a people˺ until We have sent a messenger to warn them".*[5]

Almighty God also says: "And never would your Lord have destroyed the cities until He had sent to their mother a messenger reciting to them Our verses. And We would not destroy the cities except while their people were wrongdoers",[6] and "Messengers who gave good news as well as warning, that mankind, after (the coming) of the messengers, should have no plea against Allah: For Allah is Exalted in Power, Wise".[7]

Sources of legislation in Islam are divided into three sections: Primary sources: There are two of them:

- **The Holy Qur'an:** The primary source of legislation in Islam.
- **The Sunnah:** The Prophet's sayings, actions, and approvals.[8]

There are two additional sources that branch out from the main ones among Sunnis: consensus and analogy. Consensus refers to the agreement of the scholars of the community in a particular era on a ruling, provided that it is supported by evidence from the Quran or the Sunnah. On the other hand, analogy involves relating one matter to another based on a shared reason between them.

The Islamic judge, when faced with a case for which there was no ruling in the Quran or the Sunnah, and where no consensus had been

established, would seek out a similar issue that had received a ruling from the Quran, the Sunnah, or consensus.

For all these reasons, it is essential to clarify the general objectives of Sharia, so that the obligated individual is aware of them and can discern what to accept and what to reject, weighing their benefits and harms.

The objectives of Islamic law is to fulfill the interests of individuals by first establishing them and then preserving them. These interests can be categorized into three types based on observation: necessities, needs, and enhancements, each of which has its own complements.[9]

The secondary sources that Sunni lawmakers draw upon, there's quite a bit of debate surrounding some of them, but there are definitely a lot to choose from.

The key ones include ***Istihsan*** (which means approval or approbation), unrestricted public interest (or ***Maslaha Mursala***), and ***Istishab*** (the presumption of continuity). Additionally, there are overarching principles laid out by the field of Islamic jurisprudence that focus on the welfare of the community, such as:[10]

preventing harm, relieving hardship, obstruction of pretexts, warding off evils, the lesser of two evils, Necessity may authorize forbidden acts, whatever Muslims deem good is good, whatever leads to what is forbidden is forbidden,

matters are judged by their intentions, whatever fulfills an obligation is itself obligatory, rulings change with the changing times.

These are, in order, the sources of legislation in Islam, which include primary, secondary, and subsidiary sources, as well as general principles. Muslim judges from the Sunni tradition rely on these sources.[11]

This principle is a cornerstone of modern criminal law, emphasizing that for an act to be considered a crime, it must be defined by a legal text. This requirement effectively narrows the sources of criminalization and punishment to those legislative documents. It

establishes a key tenet known as "the principle of legality concerning crimes, punishments, or security measures."

In simpler terms, it means that a crime can only be defined through a legal text, and similarly, a punishment can only be imposed by a legal text (as stated in Article 1 of the Penal Code): "There is no crime, no punishment, and no security measures without a law".[12]

While having a legal text that defines a crime is important, it alone doesn't make the conduct punishable; this text must be in effect at the time the crime (behavior) is committed, applicable in the location where it occurred, and relevant to the individuals who committed it.

2.1.2. The Principle of Non- retroactivity

This rule justifies that assigning a person to behave in accordance with a text that has not yet been revealed, and therefore is unknown to them, constitutes a demand for something beyond human capability and strength. The Islamic legislator is free from imposing impossible obligations on anyone and It's important to remember that the Islamic legislator would never impose such an impossible demand on anyone.

Almighty God says: "Allah does not require of any soul more than what it can afford",[13] "Our Lord! Do not burden us with what we cannot bear",[14] thus, this principle of justice has been applied widely, which is why we see numerous verses in the Holy Quran that forbid certain actions. Interestingly, these verses also clarify that no punishment will be imposed on anyone who engaged in such behavior before the prohibition was revealed.

Among the important statements is the one from God Almighty, which forbids marrying one's father's wife: "Do not marry former wives of your fathers - except what was done previously. It was indeed a shameful, despicable, and evil practice".[15]

Additionally, the Almighty speaks against usury: "Those who consume interest will stand ˹on Judgment Day˺ like those driven to madness by Satan's touch. That is because they say, "Trade is no different than interest."

But Allah has permitted trading and forbidden interest. Whoever refrains - after having received warning from their Lord - may keep their previous gains, and their case is left to Allah. As for those who persist, it is they who will be the residents of the Fire.

They will be there forever."[16], thus, this verse stipulates that there is no penalty for someone who committed usury before it was prohibited, as long as he refrained from it after the text prohibiting usury was revealed.

Absolutely, this principle was applied more broadly in Islam, extending to those who engaged in wrongful actions before embracing the faith, even if those actions took place after the revelation of the prohibition.

God Almighty stated: "Tell the disbelievers that if they desist, their past will be forgiven. But if they persist, then they have an example in those destroyed before them".[17]

The principle of non-retroactivity of laws is a key concept in both criminal and civil law within modern legal systems. In the realm of criminal law, it means that a law cannot be applied to actions that took place before it came into effect. This principle is often discussed in the context of how long a law is valid and how it should be applied.

There are some exceptions to this rule, particularly when it comes to laws that are more favorable to the accused **Retroactive Application"**. For instance, if a new law is passed after a crime has been committed but before a final judgment is made, and that law offers a lighter sentence, then it can be applied. This is because the purpose of criminal law is not to seek revenge but to reform and guide the accused. As a result, courts will often set aside the harsher laws in favor of those that are more lenient.

This approach has been upheld across various aspects of law—substantive, procedural, and even practical. Islamic jurisprudence, for example, adheres to the fundamental principle that: "No religious obligation is imposed except for an act that is possible and within the

capacity of the obligated person (the Legally competent), and that they have knowledge of, which leads them to comply".[18]

Sometimes, a new law comes into play while someone is already serving time for an offense that was considered a crime under the previous law. If the new law decriminalizes that act, it means the person can no longer be punished for it. In such cases, the sentence is put on hold, and its criminal implications are wiped away. This is one of the most beneficial ways the law can work in favor of the accused.[19]

Islamic criminal law also acknowledges the idea of nullifying criminal laws with the revelation of the Quran. Under Sharia law, punishment is only applicable for acts that occurred after the Quran was revealed and only for those committed while it was in effect. Once God completed the religion, there was no further abrogation of the Quran or the teachings of His Messenger,[20] as stated in the Almighty's words: "Today I have perfected your faith for you, completed My favour upon you, and chosen Islam as your way".[21]

2.1.3. The Retroactivity in Sharia:

Islamic law has embraced the principle of justice, which was actively practiced during the time of the Prophet (PBUH). A notable example of this is the removal of the flogging punishment for a husband who falsely accuses his wife, which was replaced by the option of mutual cursing.

The details of this are that the verse was revealed regarding slander, and it stipulated the punishment for this crime in a general formulation, such that it is applied to every slanderer of a married woman, even if the slanderer is her husband.

God says: "*And those who accuse their wives ˹of adultery˺ but have no witness except themselves, the accuser must testify, swearing four times by Allah that he is telling the truth, and a fifth oath that Allah may condemn him if he is lying. For her to be spared the punishment, she must swear four times by Allah that he is telling a lie, and a fifth oath that Allah may be displeased with her if he is telling the truth*".[22]

The verse about Cursing was directed at aman, even though it came to light after he had already committed the act of slander. So, the more fitting verse, the one about Cursing, was applied to him, even though it was also revealed after his wrongdoing.[23]

This is what we see in the ***Hudud*** legislations, which aims to apply the law in the most favorable way for the accused. Essentially, if a law is passed while the accused is still undergoing trial or before the judgment is finalized, and that law either allows the act committed by the accused or benefits them in some way, then the law that favors the accused will be put into effect.

2.1.4. The Criminal liability is Personal:

According to Islamic law, no one is held accountable for a crime except the person who committed it or participated in it. No one else is held accountable for his crime, regardless of the degree of kinship,[24] thus God says: "No soul burdened with sin will bear the burden of another".[25]

The pain of punishment primarily impacts the individual who has been convicted, leaving family members and relatives largely unaffected. So, the immediate consequences are confined to the person who committed the crime.

However, there are indirect repercussions to consider, like the potential loss of a family leader if the convicted person faces execution, which can indeed affect others. Still, this collateral damage doesn't undermine the justice or necessity of the punishment itself.

2.1.5. Equality in the Application of Sharia

The judge has a duty to treat everyone fairly, regardless of whether they are Muslims or non-Muslims. As stated in the Holy Book, Allah Almighty says: "Indeed, Allah commands you to return trusts to their rightful owners; and when you judge between people, judge with fairness. What a noble commandment from Allah to you! Surely Allah is All-Hearing, All-Seeing".[26]

The term "people" encompasses both Muslims and non-Muslims, which means the call for justice is universal and not confined to just Muslims.

The Holy Qur'an calls out the Jews for not treating followers of different faiths equally, which goes against the spirit of piety. The Prophet, peace and blessings be upon him, made it clear that oppressing non-Muslims is forbidden. True equality among rivals can be fostered through gatherings, gestures, words, and even the tone of one's voice.

Islam isn't just about preaching brotherhood and equality; it instills the belief that all people are equal, much like the teeth of a comb. It teaches that those who may be enslaved are still your brothers in faith, and that believers stand together as allies.

The religion laid down laws rooted in these principles of brotherhood and equality, creating a reality where these values were felt and lived. The Messenger of God, peace and blessings be upon him, dedicated himself to ensuring that this faith was deeply embedded in their hearts. Their community was solidified to the point where one would declare from the pulpit, “If we see any wrongdoing in you, we will set it right with our swords”."[27]

Taking a look at the reconciliation and settlement document from the province of Khenchela that we discussed earlier, it’s clear that it doesn’t really cover how disputes are resolved. Specifically, it lacks details on how individuals appear before the council, how sessions are scheduled, how the parties involved are summoned, and how the rules laid out in the document are applied, including the process for issuing and enforcing rulings.

It’s important to note that this document was created by the imams, notable figures, and dignitaries of Khenchela at the Abdel Hamid Ben Badis Mosque, and the rulings are based on Islamic law. Therefore, the procedures outlined are closely tied to the principles of our true religion.

2.2. The areas of customary reconciliation overseen by the customary judiciary council of Khenchela

One of the key legal principles that underpins most modern criminal laws is the idea of “the legality of crimes and punishments”, which can also be summed up as “no crime or punishment except by

law", or simply "textual legality". These phrases all convey the same meaning.[28]

A crime is realized by an act committed by a human being, which takes on a specific physical form. Physical acts vary according to human activities. This prompts the legislator to intervene to define a category of acts that are harmful or dangerous to the safety of members of society, prohibiting them by means of a penal legal text that criminalizes these acts and specifies the punishment for those who commit them.[29]

Therefore, to study a specific crime, it is first necessary to examine the legal text relating to the criminal act and to determine whether it is not subject to any of the Causes of non- responsibility.

In accordance with the subject of my study, in this section, I will analyze the document on customary provisions and regulations, Abdelhamid Ben Badis Mosque, Khenchela, amended on December 30th, 2017, as follows:

2.2.1. Criminal Offences Against Individuals

The discussions among the notable figures sessions from the municipalities and districts of Khenchela Province led to a clear distinction between various types of crimes, including premeditated murder, semi-premeditated murder, manslaughter, traffic accidents, and manslaughter involving firearms. Each of these offenses was clearly defined, and their specific characteristics and forms were outlined.

2.2.2. Personal Status, Civil, and Commercial Cases

Referring to the Reconciliation and Reconciliation Document, it's evident that it doesn't cover important matters like marriage, divorce, alimony, or child custody. This is surprising, considering how crucial these topics are for managing family dynamics, establishing rights and responsibilities between men and women, and addressing the core of private life.

By aligning personal status laws with religious authority, the state navigates its relationship with individuals through traditional powers, often placing families under the influence of various religious leaders.

Additionally, the Council didn't touch on commercial cases, possibly because such issues weren't brought up in their discussions. The notables of the Council could improve this situation by incorporating these topics into the document, ensuring they're fully aware of all societal concerns.

3/ The Procedural Guarantees

Islam has introduced several procedural safeguards that ensure judicial justice, which have only recently started to appear in positive legislation. Below, we'll explore some of the most significant of these safeguards.

3.1. Procedural Guarantees in Islamic Sharia and Customary Councils

3.1.1. The Presumption of Innocence

The accused is innocent until proven guilty with certainty. God Almighty said: "And suspicion is of no avail against the truth". Two results follow from the principle of innocence.

- ***The burden of proof lies on the plaintiff***

In civil cases, plaintiffs must prove their claims through evidence using the "preponderance of the evidence" standard (more probable than not), while defendants are not required to prove their innocence. This burden allocation protects defendants from baseless claims while ensuring claimants substantiate their grievances fairly.[30]

- ***The burden of proof shifts to the defendant***

The responsibility to provide evidence lies with the person making the claim. As the Messenger of God, may God bless him and grant him peace, stated: "The burden of proof is on the one making the claim, and the oath is on the defendant".

During the Ottoman occupation of Algeria around 1410, the principles of Islamic law remained in effect, especially regarding criminal evidence. While testimony was the primary means of proof, it didn't rule out other methods like oaths and confessions.

- ***Doubt is interpreted in favor of the accused***

The Messenger of Allah, may Allah's prayers and peace be upon him, once said: "Do your best to avoid imposing the prescribed punishments on Muslims. If there's a way to let someone go, then do so. It's far better for an imam to make a mistake by forgiving than by punishing".[31]

There's a general agreement that theft, like other prescribed punishments (except for slander), can only be established through confession or solid evidence, and an oath isn't necessary.

However, when it comes to slander, opinions among jurists vary. Some, including the ***Hanafis***, believe that an oath isn't needed for the prescribed punishment for slander, since if the offender refuses to take the oath, they can't be punished.

On the other hand, some jurists, like the ***Shafi'is***, argue that an oath is indeed required, and if the offender refuses, the prescribed punishment should still be enforced. Interestingly, there's a Hanafi perspective that aligns with the ***Shafi'i***[32] stance on this matter.

The presumption of innocence is a straightforward idea; it's not definitive and can be challenged. This concept is validated when guilt is established through a final court ruling, as that ruling serves as the only undeniable evidence of the truth, which remains unchallenged until something alters that truth.

Interestingly, Islamic law was ahead of the curve in adopting this principle, making it a cornerstone of Islamic criminal law. This idea wasn't part of ancient positive law, but it started to gain traction in the early eighteenth century. During this time, thinkers and philosophers like Voltaire, Jean-Jacques Rousseau, Beccaria, and Montesquieu began to critique the criminal justice system, paving the way for this important principle.

In Algeria, the law states that the Public Prosecution Office is responsible for starting and pursuing criminal cases. This can happen when a crime is reported by the victim, the police, or even a bystander, regardless of whether the victim is known.

When a criminal case is brought against someone who is presumed innocent, it's up to the Public Prosecution Office to prove their guilt. This holds true even if the victim is the one who initiated the case in rare situations. Essentially, the victim's role is limited to kicking off a public case, while any further legal action they take is confined to civil matters, not criminal ones.

However, in civil cases, it's up to the parties involved to prove their claims against each other. Each side carries the responsibility to back up their allegations with evidence.

On the other hand, the presumption of innocence in criminal cases places the entire burden of proof on the prosecution. They must demonstrate every element of the crime and link it to the accused. This means the accused has to mount a defense using any means available. According to Algerian law, "Crimes may be proven by any means of proof...".[33]

The judge needs to base his conviction on solid and legitimate evidence because following the law is a key part of upholding the constitutional principle of the rule of law.[34]

This is clearly outlined in Article 47 of the Algerian Constitution, which states: "...No search can be made, except in compliance with a law and in conformity with its provisions. A search may only be effectuated by virtue of a warrant issued by the competent judicial authority".[35]

Accordingly, the principle of the presumption of innocence stands as a crucial foundation for the legitimacy of criminal procedures. This idea reinforces the rule that no one should face punishment unless there's a legal basis for it.

It highlights that the default state is one of permissibility, with criminalization and punishment being the exceptions. This leads us to another important rule: the accused is presumed innocent until proven guilty. Understanding the essence of this principle is essential.

3.1.2. Prohibition of torturing the accused

Torture, as outlined by the wise Shari'ah, serves as a method of punishing those accused of crimes. It involves implementing specific

punishments (hudud), retaliation (***qisas***), and discretionary punishments (***ta'zir***) to discourage criminal behavior and protect both individuals and society from harm. Here are some forms of punishment that Shari'ah permits:

First, if the accused is known for their righteousness, piety, and good character - Essentially someone who is innocent and not deserving of accusation- then, according to the consensus of respected jurists, punishing them is not allowed.

Second, if the accused is unknown and the ruler or governor lacks a reputation for righteousness or morality, the accused may be held in prison until their case is clarified.

This is supported by a narration from Buhaiz ibn Hakim, who reported that "The Prophet, peace and blessings be upon him, imprisoned a man on suspicion of immorality".

Lastly, if the accused has a known history of immoral acts, such as theft, robbery, murder, or adultery, it is permissible to imprison and even beat them. If it's acceptable to detain someone whose character is unknown, it stands to reason that it's even more justified in the case of someone with a known history of wrongdoing.[36]

3.1.3. Fair Trial

The Holy Qur'an emphasizes that establishing justice on earth is the most important goal we can strive for, right after worshiping God. In fact, it's not just a separate aim; it's a vital part of worshiping God, which stands as the ultimate goal of our lives.

The Holy Qur'an has made it clear that God Almighty sent His Messengers and revealed His Books so that people would uphold justice, that is, fairness. God Almighty says: "Indeed, we sent Our messengers with clear proofs, and with them We sent down the Scripture and the balance of justice so that people may administer justice. And We sent down iron with its great might, benefits for humanity, and means for Allah to prove who is willing to stand up for Him and His messengers without seeing Him. Surely Allah is All-Powerful, Almighty".[37]

In the realm of justice, every human right is upheld because justice itself is a broad concept that includes all human rights, a principle embraced by Islam. When justice is overlooked, human rights suffer; without a commitment to justice, we risk descending into a lawless state, ruled only by the might of the strongest.

This is the very approach that international law, as outlined in the Charter, seeks to avoid. We must examine the realities of the situation and the implications of the Charter's texts, rather than getting lost in the flowery language that claims to uphold and celebrate human rights.[38]

It's widely recognized today that for someone accused of a crime to truly benefit from their right to a fair trial, they need to be provided with a set of guarantees and rights that uphold this principle. These guarantees are known as procedural rights.

By adhering to these rights, we come to an essential understanding: they are fundamentally rooted in a crucial idea—the presumption of innocence. This principle reinforces that embracing these guarantees is key to ensuring a fair trial. The accused's right to a fair trial encompasses every phase of the trial process and its procedures.

3.1.4. The Right to Appeal

As mentioned earlier, there wasn't a supreme authority in charge of enforcing judgments. For Arab Muslims, the judiciary was more of a choice than a requirement, and it was up to the parties involved in a dispute to decide whether to follow the ruling. They could easily refuse to comply and even resort to force to settle their differences again. Typically, arbitration was handled by tribal sheikhs and priests, who, leveraging their influence, took various steps to make sure their decisions were carried out.

The Right to Appeal rulings in Islamic law has been established through the actual Sunnah of the Messenger of God, may God bless him and grant him peace, who approved this principle. This was evident in the case of "Al-***Zubiyah***", an incident that occurred in Yemen, when the tribes to which the victims belonged disagreed over determining

responsibility for the incident and the amount of blood money that must be paid.

Among the reasons for appealing rulings, Islamic jurisprudence attributes the grounds that permit challenging rulings to several reasons, the most important of which is the violation of a text in the Holy Qur'an, the Noble Prophetic ***Sunnah***, or consensus. In these cases, the ruling does not meet its conditions and must be overturned.[39]

Jurists have had varying opinions on what exactly constitutes an appeal in cassation. For our discussion, we'll focus on Dr. Ali El Kik's definition, as it aligns most closely with the ultimate aim of an appeal in cassation, which is to modify the ruling in question. He describes it as: "A procedural means established by the legislator to allow the interested party among the litigants to voice their concerns about a ruling that has caused them harm before a court, with the goal of annulling or altering it".

The core idea behind an appeal is to take a dispute to a judicial body with the goal of correcting the ruling that's being challenged and addressing any flaws it may have. A cassation appeal is a bit unique; it's designed to ensure that the law is applied correctly and that its interpretation is consistent.

This applies equally to both substantive and procedural law. What sets it apart is that it doesn't rehash the dispute or make a new decision on it. Instead, it introduces a new issue that highlights specific flaws in the ruling being appealed, all within a set timeframe and following particular procedures.[40]

An appeal in cassation is an extraordinary procedure aimed at bringing a ruling or decision into conformity with the law, whether it relates to the substantive rules applied to the case or the procedural rules on which it is based. If the Supreme Court finds that a ruling or decision violates the law in the procedural or substantive aspect, it will overturn it and reject the appeal if the ruling or decision conforms to the law.[41]

3.2. Penalties imposed by the reconciliation councils in Khenchela

For the penalties outlined in the reconciliation and settlement document we discussed earlier, there are only two types of penalties for all offenses: retaliation and blood money. Now, blood money varies depending on how serious the crime is.

The document mainly focuses on defining blood money, providing evidence of its legitimacy, and explaining why it's necessary. It also defines retaliation, which is specifically tied to premeditated murder, and it doesn't include any of the penalties found in Islamic law or the Algerian penal code.

Likewise, as for retaliation, once the victim decides to waive the penalty or forgive the perpetrator, the punishment shifts to blood money. What's interesting about these two types of penalties, especially when you stack them against criminal penalties, is how lenient they are. While they aim to support victims by helping them avoid the harsh realities of penalties that can limit their freedom—like associating with criminals and the fallout that comes with it for those without prior convictions—they might unintentionally encourage crime.

This is particularly true for those who are financially comfortable and can afford to pay blood money. It’s clear that we need to toughen up these penalties and consider adding more serious consequences that truly deter crime, such as expulsion or exile. And why not bring back retaliation, especially for serious offenses like child abduction, rape, and similar crimes.[42]

It also stipulates a fine for certain crimes, such as brandishing a bladed weapon, using electric shocks, tear gas, and the like.[43]

Referring to the document, we find that it defines blood money as: "The money paid to the victim, their guardian, or their heirs as a result of the crime committed against them, or the money due for the loss of a human life or limb." This definition limits blood money to crimes that affect a human life or limb, while we find that all the crimes stipulated in this document are compensated for by blood money.

In the case of murder and the lack of retaliation, it is not just to absolve the perpetrator of responsibility. Rather, it is necessary to protect human blood from being wasted, and to guarantee the perpetrator the effect of his crime in a way that reduces, as much as possible, the anger in hearts and the hatred in souls. There is no doubt that money has a good effect in reducing pain and healing what is in hearts.

Just as paying money by the perpetrator causes him harm in the form of a decrease in his wealth and the wealth of his family or his kin. This harm that befell the perpetrator is accompanied by benefits for the injured party, as it makes his life better, and he finds in it his assistance in life. Just as it contains deterrence and restraint that curbs the reins of anyone who would dare to harm others.

In the case of murder and the lack of retaliation, it is not simply just to let the perpetrator off the hook. It's crucial to protect human life from being wasted and to ensure that the perpetrator feels the weight of their acts in a way that helps ease the anger and hatred that can fester in people's hearts.

There's no denying that money can play a significant role in alleviating pain and mending emotional wounds. When the perpetrator pays compensation, it not only causes them financial loss but also benefits the victim, improving their quality of life and providing them with some support. This process also serves as a deterrent, discouraging anyone who might think about harming others.[44]

4/ Conclusion:

Customary judiciary is all about the traditions that guide customary tribes and extended families. It’s a unique mix of Islamic Sharia law and the cultural practices that are prevalent in society.

For it to hold weight and significance, its decisions need to be officially recorded in the courts, following the proper legal channels. This is important because these decisions come from individuals who possess good judgment, deep insight, a strong religious foundation, and respected leadership. They act as a viable alternative to the formal government judiciary.

Therefore, it's crucial to recognize and acknowledge customary judiciary to be integrated as a model of restorative justice within the legal framework. It stands out for its quick resolution of disputes and the adaptability of its processes. Moreover, it showcases its capacity to evolve with societal changes, adjusting its rulings to align with the current social landscape.

Results:

- The councils' reliance on local customs and traditions.
- Both Islamic law, customary councils (represented by the Ben Badis Mosque Council in Khenchela), and legal texts recognize the right of all individuals to sue for crimes against public rights, even if they are not the victim. This is due to the fact that this category of crimes is a religious duty performed by those responsible for Muslim affairs, and is a matter of enjoining good and forbidding evil.
- The penalties prescribed by the notables of the customary council are not commensurate with the crimes committed. This may be due to the lack of qualified individuals.
- The documents approved by the councils are not updated by adding or renewing crimes and their appropriate penalties, in line with the rapid developments witnessed by our society today.
- There is no documentation of the disputes presented to these councils and the rulings issued by them.

Recommendations:

- Recognizing these councils, giving them legal status, and making them a model for alternatives to criminal litigation or conciliatory justice.
- Integrating conciliatory justice and making it part of the legal system, given its credibility and the people who resort to it to resolve their disputes.
- Establishing a system to regulate how this judiciary is administered and selecting qualified individuals to undertake this work, which protects the rights and freedoms of individuals.

- The necessity of documenting the rulings and penalties applied to litigate crimes before these customary judicial bodies.

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