

AMENDMENTS TO THE CODE OF MILITARY JUSTICE IN ALGERIA: CAUSES A LEGAL AND PROCEDURAL REVOLUTION

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Abstract:

The new Military Justice Code 17-18 came after 37 years of military judicial practice under the 1971 Act, this practice revealed many shortcomings, flaws, legal gaps and a lack of fair ruling indicators. Subsequently, the 2018 amendment led to a legal and procedural revolution in legal reforms. The military justice where the code included the new military justice and for the first time fair ruling indicators derives, its legal rules from the constitution and international conventions, as well as new provisions of the of military justice in the sense of a two instances litigation to ensure judicial security, also the establishment of the military indictment chamber, which allowed him to include the basic rules of justice.

Keywords: *Military Justice, Two instances Litigation, Military Indictment Chamber, Military Causation verdict, Military Professionalism.*

INTRODUCTION:

The reforms of the military justice came after more than 37 years since the issuance of the military justice in Algeria on 1971¹ wherein the military facility continued to apply the code texts of the military justice or which is known as the military courts law until the issuance of military justice code with the new formula, wherein the issuance of law 17-18 on the amendment and complementation of ordinance 71-28 aforementioned², and the substantive and important amendments came through reforms wherein international legal rules were introduced among the military justice code amended and complemented for the first time.

The cause of the amendment of the military justice code in Algeria is attributed to different factors of which the most important is that the aforementioned military justice code is not, anymore, in compliance with the requirements of the military institution, particularly with the military professional programs which is considered among the most important programs of President Abdelaziz BOUTEFLIKA wherein the Commander in Chief of the armed forces and the Minister of Defence declared on a number of occasions the necessity to modernize the army facility and to pay attention to the legal system of this institution¹ and accordingly, a strong political will to reconstitute the legal system of the army facility embodied.

Thereupon, it became necessary that the military justice code complies with the international data and the emergence of new forms that threaten the peace and security⁴, in this context numerous previous amendments were brought to the legal system of the army facility⁵ of which the most important is the statute specific to the officials of the military institution² as well as the disciplinary code of the military personnel and the military pensions code⁶.¹

¹Ordinance n°71-28 of 26 Safar 1391 corresponding to 22 April 1971 on the military justice law, this ordinance preceded law n°64-242 of 22 August 1964 on military law justice, Official Journal n°36 of year 1964.

² Law n018-14 of 29 July 2018 amending and complementing ordinance n°71-28 on the military justice.

³ Revue de l'Armée (Army revue), preamble and correspondences of the President of Republic on the occasion of celebrating 1 November and 5 July

⁴ Read article of Dr. Abou El Fadhl Mohamed BAHLOULI, Role and functions of the Algerian Army in the constitutional vision, revue des trésors de la sagesse (Revue of Wisdom treasures), the capital.

Among the most significant critics destined to the military justice code before its amendment, is the lack of the fair ruling indicators that have been rectified in the amendments ⁷that we will consider in this article, in the same context the constitution amendment on 06 March 2006 had a significant and direct effect on the military justice code and the legal system of the army had to comply with the constitution amendment, it is notable that the mechanism of issuance of this code came after going through the National People Assembly and the draft law was submitted by the Ministry of National Defence wherein the legal and administrative affairs and liberties commission with the National People Assembly presented a complementing report on the law draft that amends and complements ordinance n°71-28 on the military justice code wherein the commission brought three amendments and this with the purpose of seeking to consecrate the terminology contained in the penal procedure code and affirmation thereof that the military justice is not a special jurisdiction and it is a justice that falls into the national justice and remains subject to the control of the High Court, and by comparison in the formal and procedural side, the former code appeared in the form of a presidential ordinance without going through the National people Assembly authority⁸.

Before these data, the forms presented are what are the sources of the military justice code and what are the most significant amendments that affect this code.

Before to treat the survey of the most important amendments of the new military justice code, it is indispensable to point to a very substantial point and particular to the ideology of the Algerian military institution and which did not change since 1962 and consisting in the non-participation of the Algerian army outside the territory of the Republic pursuant to diplomatic principles that Algerian decision-maker maintains and which the non-interference of the Algerian in the affairs of the others⁹.

First : Sources of the military code

The military justice code based on a set of legal sources wherein and by reference to the content of the legal texts constituting the military justice code, we note that therein both international and local sources and the philosophy of the Human rights are embodied thereof as well as the fair ruling and indicators of the judicial rulings quality and the right of litigation at two instances and the right of defense, and for the order of the sources, we based on the pyramid of the Jurist Kelsen wherein we treat legal sources which are the Constitution, then the international treaties and thereafter the legislation.

First : Sources of the military justice code :

1. The Constitution:

By reference to the preamble of the Algerian Constitution of year 2008, the first author of the Constitution pointed, for the first time, to the professionalism of the military institution and considered it as a State project and that Algeria toward the project of the army professionalism, as he stipulated the constitutionality of the military institution professionalism in the introduction of the Constitution and which constitutes a large step for the support of this institution and the consecration the constitutionalization of the professionalism project as well, wherein the French administrative justice confirmed in numerous juridical reports on the legal value of the preamble

⁵ Law n°06-02 of 28 February 2006 on the general statues of the military employees.

⁶ Ordinance n°04-01 of 21-07-2004 amending and complementing ordinance n°76-106 on the military pensions law.

⁷ Refer to the Magisterium thesis of BAHLOULI Abou el Fadhl Mohamed, legal system for recruitment in the Algerian army, University of Djilali Liabes Mascara , Faculty of Law and Political Sciences.

²of the Constitution and considered it among the general principle of law and which have the same legal value of the legal basis and this in the decision issued by the French State Council and accordingly, the Constitution author would have instituted, through the text of the army professionalism in the introduction of the Constitution, a principle which is the military institution professionalism.

- No provision for the Military Court in the Constitution :

By reference to the Algerian Constitution, it has not been pointed to the creation or competence of the Military Court, whereas the Algerian Constitution stipulated the judicial regulation and it adopted the judicial duplicity where we noted the civil jurisdiction and the administrative jurisdiction besides the litigation court, and maybe the Constitution author considered that the Military Court includes among the national justice regulation and it is not an special jurisdiction or a particular jurisdiction , correspondingly we note that some Constitutions of the Arabic States prescribed the creation of the Military Court and its competence among its Constitution in line with the State of Bahrain where the Bahraini Constitution stipulated in article 105, paragraph thereof on the following: the competence of the Military Courts treats the military crimes caused by the members of the Defence Forces and the National Guard and the Public Security, and it does not extend to others, unless a martial law is stated and this within the limits provided by law.

1. The international treaties:

The international treaties were the most important source of the military justice code in line with the Universal Declaration of Human Rights and the international treaties for the civil and political rights, and from the international obligation to which Algeria is subject under the Constitution, the military justice code came to consolidate the observance of the international law and the Human rights, it thus has been proven the extent of the conformity of the military justice code rules with the international treaties.

a. The Universal Declaration of Human Rights as source for the military code

Whereas the military justice code derives principles of human dimension from the Universal Declaration of Human Rights issued on 10 December 1948¹⁰, particularly article five wherein the declaration stipulates that *“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”*, and in this context the military justice la includes the respect of treatment of the military official in the event where he would commit any penal or disciplinary fault according to law, wherein the establishment of a special court should be considered itself as a large guarantee, the military law states as well that no military official shall be subject to arrest or detention except by virtue of legal procedures and under the control of the military justice which is stipulated in the Universal Declaration of Human Rights, particularly article 9 and 10 thereof wherein the Universal Declaration of Human Rights stipulates that *“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him..”*

The project considered the presumption of innocence among the rules of the military justice in compliance with article 11 of the Universal Declaration of Human Rights.

b. The treaty relative on civil and political rights :

The military justice code based on the clauses of this treaty¹¹ and it has been demonstrated through the universal principles relative to the introduction of the military penalties, particularly the capital penalty wherein it was connected to the military justice with the actions that accommodated that it

⁸ The complementing report of a law project amending and complementing ordinance n°71-28 of 22 April 1971 on the military justice law, commission of legal and administrative affairs and liberties, eighth legislative paragraph, 6 & 7 May 2018

⁹ Dr. Abou el Fadh Mohamed, « The Constitution Regulations that regulate the functions of the military institution in Algeria, El-hikma revue, seventh number, January 2016

is one of the most serious crimes, moreover the military court is not entitled to rule with the capital penalty except by virtue of a definitive judgment issued by the judicial authorities.

The military justice code added a significant principle derived from the international rules that it is not entitled to rule the capital penalty over a person aged less than 18 years.

¹⁰ Approved by Algeria by virtue of article 11 of Constitution of year 1963, Official Journal n° 64 of 10 December 1963.

¹¹ The international institute relative to the civil and political rights adopted and presented for signature and approval and join the report of the general assembly on 16 December 1996, approved by Algeria by virtue of the presidential decree n° 89-67 of 16 May 1989, Official Journal of year 1989.

Pursuant the international treaty, the military justice stipulated the non-existence in the stipulation of his military provisions any penalty relative to the forced labour or the compulsory labour in compliance with the jurisprudential maxim in the penal code and this on the basis of stipulation of article 8 of the international treaty, regarding the capital penalty in the military justice, it occurred in restricted and accurate cases according to very strict legal procedures and under the control of the High Court which the highest civil judicial authority.

It was embodied in the military justice in his new formula despite it is a special jurisdiction of fair ruling standards in line with the fourteenth text of the International Covenant on the civil and political rights that stipulates “*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”, whereas the military courts were previously established by virtue of the stipulation of law n° 64-242 of 22 August 1964 wherein the first law of the military justice ¹² to establish the military penal justice and thereupon, the first article thereof stipulated the establishment of permanent military courts in the first region, second region, the fifth region and confirmed ordinance n° 17-28 of 22 April 1974 on the military justice code in its first article.


c. The Arab Charter on Human Rights

Through examination of the content of the military code, an enhancement was integrated with the Human rights treaties and it derives his texts from the Arab charters, particularly regarding the capital penalty as well as its application to the persons aged less than eighteen years and the incapacity of the military court to execute the capital penalty on the pregnant woman.

d. The Human International Law:

The Human International Law is considered through the international treaties of Geneva as one of the most important sources of the military justice code, it is rather considered among the military code of ethics and the military professional honor obligation wherein Algeria s considered one of the Arab countries that approved this international treaty, even more than that, the Human International Law considered as a significant standard in the scientific and pedagogic doctrines with the Algerian military institutions, whereas the Algerian State took all the measures to achieve its obligations stated in the Convention of Geneva of year 1949 and the attachments added to the La Haye Convention, and Algeria a great relationship with Human International Law whereas Emir Abdelkader set judicial

¹² Decision n° 64-242 of 22 August 1964 on the military justice code, Official Journal n° 36 of year 1963.



rules to manage the army of the Emir, and in the same context and in compliance with the decision of the general assembly of the United Nations n° 55-141 of 12 December 2002, the President of the Republic caused the national commission of the Human International Law by virtue of the presidential decree n° 08-163 of 04 June 2008, and among the most important functions of the commission is the performance of training sessions for the benefit of the employees of the military institution.

Second - The legislation as sources of the military code:

a- The penal procedure code:

The penal procedure code is considered as one of the most important sources of the military justice code and by reference to the military justice code, numerous of its texts refer several times to the penal procedure code and this in the absence of the military penal procedure code, wherein the military justice code stipulated, as an example, in article 40bis that the investigation authorities or the justice may interrogate the charged and his confrontation or to hear the parties through the video chats by the observance of the rules established in the penal procedure code according to provisions of this code.

Article 45 of the same code stipulates as well that are considered as the militaries bearing the capacity of officials of the military judicial police:

1- The militaries bearing the capacity of official of the judicial police according to provisions of the penal procedure code and it is noted over the military justice code that numerous cases are referred to the penal procedure code, and we see that these referrals for which purpose is the prejudice to law force and thereupon, we suggest the establishment of a military penal procedure code in line with the military legal system.

b- Penal Code:

In the same sense, the penal procedure code, the military justice code adopted the referrals to the penal code, particularly for the stipulated capital penalties or the offence to the judicial bodies and the abuse delict wherein article 138 of the military justice code stipulated the enhancements of the penalties according to the penal code.

Third : The amendments brought to the military justice code :

Numerous amendments were introduced to the military justice code and this in line with Constitution and the international treaties as well as the legislative texts introduced recently to regulate and manage the army facility, and we will enumerate the most significant legal amendments and which we consider as a revolution in the field of the military justice.


These amendments occurred according to the fair ruling standards and the quality of the military judicial judgments in addition to the judicial security, and the military justice code stipulated, for the first time, legal rules that we will consider.

1. Capacity to sue at two instances and the judicial security in the military court:

The military justice law n° 18-14 stipulated in its fourth article 18 thereof and article 3bis “ *The military justice is rendered by the military courts and the and the military appeal boards*”.

Article 5 of the same code stipulated: “*A military court and a military appeal court are established in all military region*”.

The military court or the military appeal court bear the name of the place of presence of the seat of each of them, and their hearings may be held in any place in the territory of the military region under a decision of the Minister of the national Defence”.



The military justice code added in the stipulation of article 179bis that all the judgments issued by the military court are appealable before the military appeal court according to the procedures and the legal deadlines.

This judicial text occurred to comply with the Constitution that stipulates the capacity to sue at two levels, wherein the military justice code and its specifications became among the national justice pursuant the organic law n°05-11 of 17 July 2005.

The capacity to sue at two instances is a global principle and it is considered as an indicator of the fair ruling according to stipulation of the Universal Declaration of the Human Rights in the first paragraph of the eleventh article as well as the International Treaty on Civil and Political Rights in the fifth paragraph of the fourteenth article, the capacity to sue at two instances expresses, as well, the judicial security through the handling of errors that lay be issued by the first instance justice, and thereupon the second instance court may correct the above stated errors and their prevention.

From another side, the decisions of the military court are subject to the control of the High Court which is stipulated by the first article of the military justice code “*the military justice is rendered, under the control of the High Court, by the military judicial authorities*”, and the control of the High Court appear in numerous legal texts of the military justice through article 10, 14 and 211 thereof.

It is noted in these texts that a civil jurisdiction controls a military jurisdiction authority whereas the pyramid of the military justice is an independent civil justice which is considered as a large guarantee for the charged and an indicator of the fair ruling.

Thereupon and according to the amendment, 5 appeals courts were established at the national level on the basis of the division of the military regions and accordingly, the court seat is the court seat itself.

a- Composition of the military appeal board:

Article 6 of the military justice code stipulates that the military appeal court comprises an arbitration side, an indictment chamber, a prosecution and a clerk, it is noted in this text and by comparison with the penal procedure code, the absence of the court president, in the same context the project added the human composition of the court consisting of a judge with the grade of counsel besides two judges acting as assessors.

2- Creation of a military indictment chamber:

The military justice code stipulates in the eighth article of the military justice code that the indictment chamber of the military appeal court shall be composed of a president, a judge from the courts with the grade, at least, of president of a chamber with a court of justice and two military judges.

The president of the indictment chamber of the military appeal court is appointed for a term of one renewable year by virtue of a joint ministerial ruling between the Minister of Defence and the Minister of Justice, Keeper of the Seals, and accordingly the project defined the composition of the chamber of indictment and its place, meanwhile it is found in the civil justice and pursuant article 176 of the penal procedure code that one indictment chamber is constituted with the court of justice and for a term of three years upon decision of the Minister of Justice¹³, as understood from the stipulation of article 8 of the military justice code the entitlement to constitute more than one indictment chamber with the military courts.³

¹³ Article 176 of the Penal Procedure Code amended and complemented by law n°15-02 of 23 July 2015, Official Journal n°44.

Thus, the project adopted, in the absence of the military penal procedure code, the application of provisions of the military penal procedure code upon the military indictment chamber.

By reference to the philosophy of the penal project in Algeria, it adopts the route on ruling on the powers entrusted by law by investigation wherein we consider a magistrate jurisdiction as first instance and the indictment chamber as second instance.

3. Composition of the military court ruling on the penal matter:

The military justice in the stipulation of the fifth article thereof, introduced amendments on the composition of the Criminal Court wherein the aforementioned in the criminal articles includes this jurisdiction in addition to the president, two judges and two military assessors, and thus the project expanded the composition of the military court ruling on the criminal matters to become seven judges, and best achievement of the project is that the deliberation has more credibility and discusses the records with more accuracy.

4- Causation of judgments of the military court:

Among the most significant characteristics of the amendment of the military justice code is the stipulation of article 176 on the fact that judgment shall be caused, and includes, if the case maybe, caused decisions related to the motives of non-competence and the interlocutory applications.

This text is considered for the first time in the military justice code whereas the amended ordinance does not stipulate the obligation of causation of judgments, the judgements of the military courts are instead not caused and they are based on the personal conviction of the court as it is for the criminal court among the penal procedure code before its amendment.

Causation of judgments is considered as a strong guarantee for the charged and an indicator of the fair ruling, thus the military court became bound by mentioning the statement of facts and the evidences and the legal grounds on which the court based¹⁴, and causing constitutes the legitimacy of the military judgments, and in the shadow of causation of the military judgment, it becomes under penalty of nullity by force of law. ⁴The amended military justice law was stipulating in article 176 thereof that the judgments of the military courts are not caused but they are only questions and answers.

CONCLUSION:

Despite that the jurisprudence considers that the military justice is a special justice and exceptional, but the amendment occurred according to law n°18-14 is considered as a legal and procedural revolution in the military justice body wherein the military arbitrations became in line with the indicators of the fair ruling and the Constitution which an evidence of a political will for the development of the army facility, from another side the amendment of the juridical rules occurred in line with the project of professionalism of the National People Army.

But the discussion on the necessity of acceleration for the issuance of the military penal procedure code is a significant fact.

REFERENCES:

1. Ordinance n°71-28 of 26 Safar 1391 corresponding to 22 April 1971 on the military justice law, this ordinance preceded law n°64-242 of 22 August 1964 on military law justice, Official Journal n°36 of year 1964.
2. Law n018-14 of 29 July 2018 amending and complementing ordinance n°71-28 on the military justice.

¹⁴ Mahmoud Sayed Tahou, general theory of the judicial rulings according to the jurists, The University Reflection House of Alexandria, 2006, p.44.



3. Revue de l'Armée (Army revue), preamble and correspondences of the President of Republic on the occasion of celebrating 1 November and 5 July
4. Read article of Dr. Abou El Fadhl Mohamed BAHLOULI, Role and functions of the Algerian Army in the constitutional vision, revue des Kounouz el Hikma (Revue of Wisdom treasures), the capital.
5. Law n°06-02 of 28 February 2006 on the general statues of the military employees.
6. Refer to the Magisterium thesis of BAHLOULI Abou el Fadhl Mohamed, legal system for recruitment in the Algerian army, University of Djilali Liabes Mascara , Faculty of Law and Political Sciences.
7. The complementing report of a law project amending and complementing ordinance n°71-28 of 22 April 1971 on the military justice law, commission of legal and administrative affairs and liberties, eighth legislative paragraph, 6 & 7 May 2018
8. Ordinance n°04-01 of 21-07-2004 amending and complementing ordinance n°76-106 on the military pensions law.
9. Dr. Abou el Fadh Mohamed, « The Constitution Regulations that regulate the functions of the military institution in Algeria, El-hikma revue, seventh number, January 2016
10. The international institute relative to the civil and political rights adopted and presented for signature and approval and join the report of the general assembly on 16 December 1996, approved by Algeria by virtue of the presidential decree n°89-67 of 16 May 1989, Official Journal of year 1989.
11. Decision n°64-242 of 22 August 1964 on the military justice code, Official Journal n°36 of year 1963.
12. Article 176 of the Penal Procedure Code amended and complemented by law n°15-02 of 23 July 2015, Official Journal n°44.
13. Mahmoud Sayed Tahou, general theory of the judicial rulings according to the jurists, The University Reflection House of Alexandria, 2006, p.44.