



Limits of the Criminal Judge's Authority in Mitigating and Suspending the Enforcement of the Penalties Prescribed for Corruption Offenses

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Abstract:

Following Algeria's ratification of the United Nations Convention against Corruption, and in an attempt to align national penal legislation with international legislation, particularly with regard to economic, organized, and cross-border crimes, the legislature enacted Law No 06/01. This coincided with the growing criminal phenomenon. The existence of a specific law addressing the crimes of embezzlement and misappropriation of public and private funds, bribery, and influence peddling suggests, from the outset, that the legislature intended to impose deterrent penalties for these crimes, potentially limiting the judge's authority to grant mitigating sentences to the perpetrator of one or more corruption crimes.

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Introduction :

Criminal laws, through their provisions on offenses and the penalties prescribed for them, aim to preserve the cohesion and continuity of society within a sound framework, and to establish order in a manner that balances the public interest of the state and the private interest of individuals. Discussing this aspect inevitably leads us to the principle of the legality of offenses, which constitutes one of the most important guarantees that delineate and embody the intended objectives. Addressing the principle of the legality of criminalization also calls for examining the principle of the legality of punishment, which is no less significant, since we cannot conceive of stipulating an offense without prescribing an appropriate sanction for it.

Between the legality of criminalization and the legality of punishment lies the pivotal role played by the criminal judge in determining a penalty that appropriately corresponds to the gravity of the committed offense, taking into account the offender's personality or the circumstances surrounding the offense at the time of its commission. Neglecting all these elements in sentencing may undermine the rights of the offender on one hand and impair society's right to protection on the other.

The Algerian legislator, in stipulating offenses and their prescribed penalties, included in a special law the criminalization of acts related to corruption and their prevention, namely Law No. 06/01 dated 20/02/2006. The Anti-Corruption and Prevention Law emerged following Algeria's ratification of the United Nations Convention against Corruption, in an effort to extend national criminal legislation in line with global legislation—particularly regarding economic crimes, organized crimes, and transnational offenses. On the other hand, this law appeared in response to the growing criminal phenomenon: the existence of a special law addressing crimes of embezzlement of public and private funds, misappropriation, bribery, abuse of influence, and illicit enrichment implies from the outset that the legislator resolved to impose deterrent penalties in a way that may limit the judge's discretion in granting mitigation for the offender in one or more corruption offenses.

To what extent has the legislator expanded or restricted the judge's authority in sentencing? In other words, is the criminal judge's authority in sentencing constrained, unrestricted, or relative? And to what degree do the provisions contained in the specific anti-corruption law align with those prescribed in the Penal Code as the general law?

This is what will be addressed by examining the limits of the criminal judge's authority in mitigating and suspending the enforcement of the penalties prescribed



for corruption offenses, and by assessing how this authority varies in determining mitigation circumstances and in pronouncing suspension of enforcement.

THE FIRST TOPIC : The Extent of the Criminal Judge's Discretion in Determining Mitigating Circumstances

Mitigating circumstances represent one of the most significant achievements in the criminal judge's endeavor to individualize an appropriate sentence in harmony with the facts underlying the criminal act or the attributes of its perpetrator. Thanks to these circumstances, those convicted—initially found guilty of criminal acts—benefit from a reduction in the prescribed penalty. Mitigating circumstances are facts that may be specifically defined by statute, in which case their determination falls to the legislator, or they may remain undefined, leaving their evaluation to the competent sentencing judge. Their direct effect is to permit the judge to reduce the sentence below the statutory minimum. We will discuss first the breadth of the criminal judge's power in determining mitigating circumstances, then the constraints imposed on this power, concluding with an evaluative perspective that reviews the principal criticisms and counterarguments on this matter.

1. The Discretionary Power of the Criminal Judge in Determining Mitigating Circumstances

Law No. 06/01 on the Prevention and Fight against Corruption aligns with the general rules set forth in the Penal Code regarding granting the judge discretion in identifying mitigating circumstances. This is evident from its provision of both minimum and maximum penalty ranges, as shown in Article 25 and following provisions of the Anti-Corruption Law. The judge possesses considerable authority to select a penalty within these bounds according to the circumstances of the criminal act, its gravity, and the consequences resulting from its commission. Article 49 (1) of the Anti-Corruption Law refers to the general rules in the Penal Code concerning legal excuses exempting from punishment, stating that anyone who commits or participates in one or more corruption offenses under the law and, before the initiation of prosecution procedures, informs the administrative or judicial authorities of the crime and assists in identifying its perpetrators, shall be exempt from punishment. It is clear that Article 49 of the Anti-Corruption Law incorporates the general principle established in Article 52 of the Penal Code, which provides that excuses are specific cases enumerated exclusively by law and that, upon occurrence of the crime and liability, they lead either to exemption from punishment if constituting an exonerating excuse, or to a reduction in punishment if constituting a mitigating excuse.



First: Legal Excuses Exempting from Punishment

Although the offender commits the crime, they are exempt from punishment if legal excuses or circumstances exist that justify such exemption. In light of this, an exonerating excuse does not erase the crime itself but exempts from punishment; however, the possibility of imposing a security measure remains permissible, as stated in the final paragraph of Article 52 of the Penal Code. Exonerating excuses cannot be recognized without statutory text, as the principle is to impose punishment on the one who commits the offense, and the exception is the existence of a legal provision exempting the perpetrator from punishment. These excuses have been specified as follows:

1. Excuse of the Informant

This concerns anyone who commits or participates in one or more corruption offenses as defined in Law 06/01 and, before the initiation of prosecution procedures, informs the administrative or judicial authorities or relevant bodies of the crime and assists in identifying its perpetrators. It is noteworthy that although paragraph one of Article 49 is placed within the general context of exemption from punishment for the informant, it diverges from prior provisions by extending this exemption to cover committing or participating in the crime and applies before the initiation of prosecution. In contrast, the Algerian legislator in the Penal Code and other special laws has conditioned the informant's exonerating excuse on notification prior to the commission of the crime or its attempt¹. This is apparent in Articles 92 and 197 of the Penal Code and Article 30 of Law 18/04 on the Prevention of Narcotics and Psychotropic Substances, for example. However, in corruption offenses, diverging from general rules, the informant's excuse extends beyond commission or participation to the period before the initiation of prosecution procedures. The rationale behind this exception and distinction is unclear unless interpreted as the legislator's incentive to encourage perpetrators of corruption crimes to report them, reflecting concern over the growing scale of corruption threatening the national economy. We maintain that even offenses affecting state security are not trivial, to assert encouragement of perpetrators by exempting them from punishment before prosecution procedures.

2. Excuse of Family Relationship

The Anti-Corruption Law did not explicitly address the excuse of family relationship for exemption from punishment, unlike the Penal Code's Article 91, which exempts relatives and in-laws up to the fourth degree regarding the failure to report crimes of treason, espionage, and other offenses affecting national defense, as well as crimes of concealment and embezzlement of instruments used in these crimes. However, Article 43 of the Anti-Corruption Law criminalizes "any person"

¹ Ahcen Bouskeïa, A Concise Treatise on General Criminal Law, Dar Houma – Algeria, p 279.



who deliberately conceals all or part of proceeds obtained from corruption offenses. The phrase “any person” implies generality without exception; as long as the provision does not exclude the relative of the offender, we believe that this excuse is not embodied in corruption crimes, unlike in general criminal law offenses. Nonetheless, Article 51 of the Anti-Corruption Law in its third paragraph obliges the judge, in the event of a conviction for a corruption offense, to restitute what was embezzled or the value obtained by the convicted person as benefit or profit, even if transferred to their ascendants, descendants, siblings, spouse, or in-laws up to the fourth degree, whether those assets remain intact or have been transferred. It is evident that the legislator refers to first-degree family relations (ascendants and descendants), then second-degree (siblings), and in-laws up to the fourth degree. The legislator requires restitution of embezzled assets even if transferred to relatives, without stipulating prosecution of those relatives. Had the legislator intended to criminalize concealment by relatives of the convicted person, he would have added to Article 51 a clause such as “without prejudice to the provisions of Article 43.” Legislative intervention remains necessary to clarify the matter, making it either subject to general rules or explicitly exempted from those rules.

3. Excuse of Repentance

Exemption from punishment applies to anyone whose conscience awakens and who takes steps to erase the effects of the crime, whether by notifying the competent authorities or complying with their request before the crime is consummated. Article 182(3) of the Penal Code states that one who becomes aware of evidence proving the innocence of a detained person and voluntarily offers testimony before judicial or police authorities, even if belated, is exempt from punishment. Likewise, Article 217 of the same Code exempts from punishment anyone who, in the capacity of a witness before an official, gave a false statement and then corrected it before any harm to others results from the use of the document and before they themselves become subject to investigation. The Anti-Corruption Law does not provide contrary provisions regarding this excuse, which implies recourse to the general rules of the Penal Code and the applicability of this excuse to corruption offenses. Legal excuses specified exclusively by law obligate the judge to apply them once established, resulting in exemption from punishment but not acquittal, since they do not negate the criminalization but pertain only to sentencing. Thus, the defendant remains guilty but exempt from punishment; this does not preclude bearing court costs or the civil liability arising from their actions.



Second: Legal Excuses Mitigating Punishment

These are excuses derived from the circumstances of the criminal facts that lead to a reduction in criminal liability in favor of the proven offender. The legislator has also defined these mitigating legal excuses exhaustively, and upon their establishment, the judge is bound to impose the penalty prescribed according to predetermined rules. They differ from judicial mitigating circumstances in that the judge is bound by the limits set by the legislator, and they are exhaustive reasons with a specified scope of mitigation, unlike judicial mitigating circumstances, which are non-exhaustive and left to the judge's discretion for sentencing. The Penal Code enumerates legal mitigating excuses in Article 52. They are detailed in Articles 277 to 283 regarding the excuse of provocation, and Articles 49 to 51 regarding the excuse of minority. In corruption crimes, the legislator did not explicitly provide except for the informant's excuse under Article 49, paragraph 2. Nevertheless, one may note the following legal mitigating excuses in corruption offenses:

1. Excuse of the Informant

Article 49, paragraph 2 of the Anti-Corruption Law stipulates that the penalty is reduced by half for anyone who commits or participates in one of the corruption offenses defined in Law 06/01 and who, after the initiation of prosecution procedures, assists in apprehending one or more individuals involved in committing them. The distinction between the exonerating excuse and the mitigating excuse under this provision is the timing of the initiation of prosecution procedures, not the commission of the crime itself. If the person committed or participated in the crime and then informed the authorities before the public prosecution was initiated, this constitutes an exonerating excuse. If the person committed or participated in the crime and then informed the authorities after the public prosecution was initiated and under way, this constitutes a mitigating excuse resulting in a reduction of half the prescribed penalty for the committed offense. The judge remains bound by Article 49 regarding the reduction of the penalty, regardless of any other circumstances that might favor the convicted person.

2. Excuse of Minority

Minority refers to anyone aged thirteen to eighteen, the two thresholds under which a minor benefits from penalty reduction as follows: imprisonment of 10 to 20 years for felonies punishable by death or life imprisonment; imprisonment equal to half the penalties prescribed by law for adults in the case of felonies punishable by fixed-term imprisonment; reprimand and fine for misdemeanors. This is as provided in Article 49 of the Penal Code, which some jurists consider to have a discrepancy between the Arabic and French texts: the Arabic text refers to the minor who has not reached thirteen years, while the French text refers to the



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minor who has reached thirteen years but has not completed it ("Mineur de 13 ans")². Given that the corruption offenses under Law 06/01 are all misdemeanors, a minor who commits a corruption offense and is convicted benefits from a reduction of the penalty prescribed for misdemeanors by half, referring to the general rules as long as the Anti-Corruption Law does not stipulate otherwise to contradict the general principle in the Penal Code.

THE SECOND TOPIC : Constraints on the Criminal Judge's Authority in Determining Mitigating Circumstances

When the legislator alone specifies mitigating circumstances and confines them to certain cases, this restricts the judge's power to identify mitigating circumstances, since that authority has been entrusted to the legislator; accordingly, the judge is prevented from reducing the sentence for any reason not provided by the legislator.

Conversely, the judge is not obliged to mitigate the sentence when one or several of the circumstances noted by the legislator are present in the law, because mitigation is discretionary rather than mandatory. This distinguishes the regime of specified mitigating circumstances from legal exculpatory grounds, which obligate the judge to mitigate the penalty when they exist.

The Algerian legislator did not enumerate specific cases of mitigating circumstances but has delineated the limits to which the judge may reduce the penalty. Toward this end, the legislator embodied the relevant provision prior to the amendment of the Penal Code in a single article, namely Article 53, which did not escape criticism: some jurists considered its wording ambiguous and its decisions poorly formulated³, in that it did not specify the type of new penalty in the event of reduction to three years when the original felony carried a penalty of temporary imprisonment. The same applies to Article 119/1. Nevertheless, this critique did not prevent judges from applying these circumstances and stating them in their rulings without being compelled to refer to them explicitly.

Before the amendment of the Penal Code on 20/12/2006, the criminal judge's authority to determine and apply mitigating circumstances was broad, as noted in Article 53 of Law 82/04 of 13/02/1982 amending the Penal Code, which opened wide latitude for the judge to impose the adjudged penalty and, in doing so, permitted reduction of the prescribed penalty by granting mitigating circumstances, especially in misdemeanors or contraventions. In felonies, however, it restricted reduction by stipulating that the imprisonment term may be reduced to ten years if

² Ahcen Bouskeïa, *A Concise Treatise on General Criminal Law*, Dar Houma – Algeria, p 185.

³ Abdullah Suleiman, *Explanation of the Penal Code: General Part*, Dar al-Huda, Ain Oum Elila – Algeria, p 340.



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the prescribed penalty for the felony was death; to five years if it was life imprisonment; to three years if the prescribed penalty was temporary imprisonment; and to one year in the cases mentioned in Article 119, paragraph 1.

The judiciary gave effect to the legislator's indication in several rulings, including those confirming that applying mitigating circumstances is discretionary and lies within the judge's appreciation, not a duty imposed on them⁴. Others affirmed that benefiting from the mitigating circumstances provided for in Article 53 of the Penal Code is not a vested right of the defendant who meets the legal conditions, but rather a possibility placed by the legislator within judges' reach, leaving its application to their discretionary power; hence judges who did not grant the defendant this measure did not err in applying the law⁵.

However, the 2006 amendment introduced a series of constraints that narrowed the criminal judge's discretionary power in sentencing. It repealed the previous Article 53 and replaced it with ten articles, from Article 53 to Article 53-sexies for natural persons, and Articles 53-septies and 53-octies for legal persons.

First: Constraints on Mitigation in Principal Penalties

1. For Natural Persons:

A. In Felonies:

The legislator distinguished between a first-time offender and a recidivist.

◦ For a first-time offender without prior convictions, the reduction applies as follows:

▪ Ten years' imprisonment if the prescribed penalty for the felony is death.

▪ Five years' imprisonment if the prescribed penalty for the felony is life imprisonment.

◦ If the offender is previously convicted, it is permissible to sentence as follows:

▪ A fine with a minimum of 1,000,000 DZD and a maximum of 2,000,000 DZD for the first scenario (i.e., where originally death).

▪ A fine with a minimum of 500,000 DZD and a maximum of 1,000,000 DZD for the second scenario (i.e., where originally life imprisonment).

▪ Three years' imprisonment if the prescribed penalty for the felony is temporary imprisonment of ten to twenty years.

⁴ Criminal Judgment of December 17, 1968; Collection of Rulings drawn from the reference "Penal Law in Light of Judicial Practice" by Ahcen Bouskeïa, National Office of Educational Works, 2001, p. 27.

⁵ Two unpublished decisions cited from the previous reference, p 27.



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▪ One year's imprisonment if the prescribed penalty for the felony is temporary imprisonment of five to ten years.

◦ If the offender is previously convicted in both scenarios, it is permissible to sentence a fine ranging from 100,000 DZD to 1,000,000 DZD, in accordance with Article 53-bis 1 of the Penal Code. A fine alone is not permissible in felonies; the judge must impose it within the statutory minimum and maximum, whether originally prescribed or not, under Article 53-bis 2 of the Penal Code. For a relapsed offender, if the judge grants mitigating circumstances, they may not reduce the penalty to the statutory minimum; rather, reference is made to the maximum provided by law, as confirmed by Article 53-bis of the Penal Code.

B. In Misdemeanors:

Apart from Article 49 of the Anti-Corruption Law, the legislator did not address judicial circumstances, and in the absence of conflict, the Penal Code remains applicable to corruption offenses. The amended Penal Code distinguishes between previously convicted and first-time offenders. Article 53-bis 5 defines a previously convicted person as any natural person finally sentenced to a custodial sentence, whether suspended or not, for a felony or misdemeanor. Reductions are as follows:

◦ For a first-time misdemeanor offender, reduction of imprisonment to two months and a fine to 20,000 DZD when the prescribed penalty is imprisonment and/or a fine.

◦ Imprisonment only or a fine only is permissible, provided the term or amount is not less than the statutory minimum for the offense.

◦ If the prescribed penalty is imprisonment only, the judge may replace it with a fine not less than 20,000 DZD and not exceeding 500,000 DZD.

◦ For a previously convicted misdemeanor offender, the judge may not reduce imprisonment or fines below the statutory minimum for the intentional misdemeanor, per Article 53-bis 4 of the Penal Code; nor may the judge impose only one of them or in any case replace imprisonment with a fine.

C. In Contraventions:

For contraventions, when granting mitigating circumstances, the judge may not reduce below the statutory minimum penalty. If the offender is a first-time, non-relapsed offender and the prescribed penalty comprises imprisonment and a fine, the judge may impose only one of them without going below the statutory minimum for the contravention committed.

2. For Legal Persons:

First, it should be noted that the sole principal penalty for a legal person is a fine; all others are ancillary penalties under Article 18-bis as amended by



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Law 06/23 of 20/12/2006. For mitigating circumstances, the legislator also distinguishes between previously convicted and first-time legal persons.

- If a legal person without prior conviction benefits from mitigation, the judge may reduce the fine to the minimum fine prescribed for a natural person committing the same offense.

- If the legal person is previously convicted, the judge may not reduce below the maximum fine prescribed for a natural person for the same offense. From the penalties prescribed for corruption offenses, it is evident that the legislator preserved the judge's authority in sentencing according to the Penal Code, meaning that the previous statements concerning corruption offenses remain valid. Nevertheless, Article 48 of Law 06/01 on Prevention and Combat of Corruption may be applied as an exception introduced by the legislator to limit the judge's power to grant mitigating circumstances in favor of certain persons⁶:

- If the offender is a public officer or member of the authority.
- If the offender is a judge or a high-ranking state official.
- If the offender is an officer or judicial police agent, or exercising judicial police powers.
- If the offender is a court clerk.

And in respect of certain conditions:

- If any of the aforementioned offenders committed one or more corruption offenses exclusively specified in Law 06/01. If both conditions are met, the judge's authority to grant mitigating circumstances is constrained according to the criterion previously adopted by Algerian jurisprudence, which mainly concerned reduction below the statutory minimum. If one says the offender does not benefit from mitigating circumstances, does that mean reduction below the statutory minimum or maximum? Before the amendment of 20/12/2006, Algerian jurisprudence consistently held that applying mitigating circumstances meant reduction below the statutory minimum, including replacing imprisonment with a fine. The Supreme Court held that "there is nothing to prevent adjudicating bodies, if they decide to grant mitigating circumstances under Article 53 of the Penal Code, from sentencing to a fine without imprisonment even if the prescribed penalty is imprisonment and a fine." This position conflicted with French jurisprudence, which held that reducing below the statutory maximum suffices to apply mitigating circumstances in the sense of a contravention; if the judge is prevented from applying mitigating circumstances, they may not reduce below the statutory minimum. The Algerian legislator adopted this in the 2006 amendment, especially regarding relapsed offenders, for whom

⁶ This category is given a comprehensive codified definition in Ahcen Bouskeïa's work, *A Concise Treatise on Specific Criminal Law*, Part Two, Dar Houma, pp 7–24.



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benefit from mitigating circumstances cannot involve reduction below the statutory minimum. Moreover, after amendment, reduction below the statutory minimum is no longer a feature of applying mitigating circumstances in the Penal Code, as noted in Article 53 and subsequent provisions. Corruption offenses are not excluded from the provisions relating to mitigating circumstances, one of the main regimes judges resort to when sentencing.

Second: Constraints Concerning Ancillary Penalties

Article 9 of the Penal Code provides that ancillary penalties are limited to twelve, namely:

- Legal interdiction of managing one's affairs (habillement légal).
- Deprivation of national, civil, and familial rights.
- Residence restriction.
- Prohibition of residence in certain places.
- Partial confiscation of assets.
- Temporary ban from practicing a profession or activity.
- Closure of an establishment.
- Exclusion from public contracts.
- Prohibition on issuing checks and/or using payment cards.
- Suspension or withdrawal of a driver's license, or its cancellation with prohibition on obtaining a new copy.
- Revocation of passport.
- Publication or posting of the conviction ruling or decision.

The legislator defined these penalties in specific articles. "Legal interdiction of managing one's affairs" is defined in Article 9-bis as deprivation of the convicted person's right to manage their financial rights. Article 9-bis 1 enumerated the national, civil, and familial rights in six items: removal and exclusion from all public functions and positions related to the offense; loss of electoral or candidacy rights or wearing any decoration; incapacity and deprivation of the right to bear arms; teaching, managing a school, or serving in education; incapacity to act as guardian or curator; and forfeiture of parental rights in whole or in part. Article 11 defined residence restriction as obliging the convicted person to reside within a territorial scope designated by the ruling, and prohibition of residence as barring the convicted person from being present in certain places. Confiscation is defined as the final transfer to the State of certain property or its equivalent value, in addition to other penalties.

In corruption offenses, Article 50 of Law 06/01 provides that in case of conviction for one or more offenses stipulated in that law, the judicial authority may punish the offender with one or more ancillary penalties provided in the Penal Code. Accordingly, the general rules also apply regarding ancillary penalties.



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Given that ancillary penalties are discretionary unless otherwise stipulated, the judge has authority to impose them or not; if the judge imposes an ancillary penalty upon conviction, it is inconceivable to mitigate this penalty, since the mitigation regime does not include ancillary penalties. Confiscation as an ancillary penalty is mandatory in corruption offenses. Article 51, paragraph 2 of the Anti-Corruption Law stipulates that in case of conviction for offenses provided in this law, the judicial authority shall order confiscation of illicit proceeds and assets, taking into account situations of restitution of balances or rights of bona fide third parties. From the context of Article 51/2, it is understood that the ancillary penalty of confiscation is mandatory upon conviction, as indicated by the phrase "shall order by the judicial authority." It is clear that the word "must" should be omitted for verbal facilitation, since inserting "must" complicates the sentence to "must order by the authority...". What is stated in Article 51 is an exception to Article 50 of the Anti-Corruption Law, as the legislator made confiscation a mandatory ancillary penalty instead of the discretionary nature of other penalties. Moreover, confiscation is compulsory when it concerns proceeds and illicit assets resulting from committing the offense. Since confiscation is an obligatory ancillary penalty, the judge's discretion in assessing it is null, as they are obliged to pronounce it according to the provision.

THE THIRD TOPIC : An Evaluative Perspective on Legal Texts

A segment of jurisprudence contends that the judge's discretionary power is influenced by the role punishment plays; accordingly, it insists on granting broad discretionary authority to the judge by avoiding predetermined sentencing limits from the legislator whenever possible, since punishment aims at rehabilitating the offender and does not take into account the gravity of the crime, which would otherwise limit the constraints on the judge's discretion in sentencing⁷. In light of this jurisprudential stance, various penal codes have omitted provisions on minimum penalties and have confined themselves to stipulating only the maximum penalty, as was the case with the French Penal Code of 1992. This omission renders discourse on mitigating circumstances moot and useless, considering that abolishing a minimum penalty expands the judge's discretionary sphere and imposes a heavy burden on them in individualizing an appropriate sentence, given that it varies according to changes in the offender's personality after committing the crime and during execution.

The Algerian legislator did not adopt this approach of jurisprudence; rather, it moved closer to proponents of deterrence theory who link the severity of the penalty to the gravity of the crime, i.e., the necessity of achieving the principle of

⁷ Ma'moun Muhammad Salama, *The Limits of the Criminal Judge's Authority in Applying the Law*, Dar al-Fikr al-Arabi, 1975, p 96.



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proportionality between the criminalized act and the punishment. Therefore, the penalty must be defined precisely so as not to leave room for broad judicial discretion in its determination, or at most to render such discretion very limited, because the legislator expresses its will through the penal norm that defines the relationship between crime and punishment. Thus, proportionality considerations between crime and punishment reduce the judge's discretionary power to its lowest levels.

The Algerian legislator was initially more lenient in defining mitigating circumstances and adopting them, expanding the judge's authority to grant and apply them, as manifested most prominently in the 1966 Penal Code. Then, this authority began to be curtailed in the 1975 amendment when Article 53 of the same law was amended, raising the minimum threshold that Article 53 had previously allowed, under the pretext of leniency by the ordinary criminal judiciary in handling economic crimes⁸.

However, according to some jurists, the amendment was not successful⁹, since Article 53 was drafted in broad and general terms for ordinary crimes, whereas the legislator should have expressly stipulated that the criminal judge's authority is limited in economic crimes.

The restriction of the criminal judge's authority to grant mitigating circumstances accelerated with the amendments of 10/11/2004 and 26/12/2006 to the Penal Code. The Algerian legislator then raised the minimum penalties and stipulated that they cannot be lowered below those limits when granting mitigating circumstances, narrowing further by abolishing sentence substitution and reduction to the lowest levels. The legislator expanded Article 53 into ten full provisions (from Article 53 to Article 53 bis 8), all exclusively specifying how to calculate the penalty after stipulating in most provisions that it is impermissible to go below the expressly mentioned minimum.

The growth of criminal phenomena in Algeria in recent years, in various forms and magnitudes, on one hand, and the judiciary's leniency in confronting this phenomenon through mitigated and non-deterrent rulings, on the other, constitute the direct cause and primary motivation for the legislator's intervention to raise penalty minimums and restrict the judge's freedom in granting mitigating circumstances and reducing the sentence to a level that fails to achieve deterrence and repression.

⁸ Ahmed Majhouda, *The Crisis of Clarity in Criminal Fault in Algerian Law and Comparative Law*, Part Two, Dar Houma – Algeria, p 1019.

⁹ Ahmed Majhouda, *The Crisis of Clarity in Criminal Fault in Algerian Law and Comparative Law*, Part Two, Dar Houma – Algeria, p1019.



I. Constraints on the Criminal Judge's Authority to Order Suspension of Execution in Corruption Crimes

Jurisprudential scholars in criminal law have outlined the essential lines of the idea of suspending execution of the penalty, affirming that it is “a generally accepted notion by all, insofar as it requires distinguishing between punishing a person appearing before the court for the first time due to an offense committed inadvertently and punishing a habitual offender of the same offense. For the former, it is not sufficient that the punishment be merely light—as laws have ensured—but it must also possess merely a deterrent character. The realization that freedom from prison, with all the despair and rebellion against society that a futile punishment entails, can be enough of a warning”¹⁰.

Thus, the suspension system represents the most prominent form of the criminal judge's discretionary power in sentencing, which the legislator granted to achieve the targeted aims of individualizing punishment. The Algerian legislator aligned with established practice in other jurisdictions by including this system in the Penal Code and reproducing it in special penal laws, including those concerning corruption offenses. To what extent, then, has the criminal judge been granted authority to suspend execution of the penalty in general and specifically in corruption crimes? We will address this as follows:

firstly: Constraints on the Criminal Judge's Authority to Suspend Execution with Regard to the Nature of the Crime

Article 592 of the Code of Criminal Procedure conditions the application of the suspension system on the crime being of the nature of a public-law offense. The public-law offenses for which suspension may be ordered are misdemeanors (contraventions) and petty offenses (délits). Thus, the law requires that crimes eligible for suspension of execution in judgments pertain to a certain general category, without making suspension universally permissible for judgments in all types of crimes.

Among the crimes excluded from the suspension system are felonies (crimes), unless the offender is sentenced to a misdemeanor penalty, i.e., imprisonment substituting for a prison sentence after benefiting from mitigating circumstances under Article 53 et seq. of the Penal Code. This applies to felonies punishable by fixed-term imprisonment but not those punishable by life imprisonment. Article 53 of the Penal Code, as noted above, allows reducing a fixed-term imprisonment sentence to three years' imprisonment if the prescribed penalty is fixed-term imprisonment of ten to twenty years, and reducing it to one year if the prescribed felony penalty is fixed-term imprisonment of five to ten years.

¹⁰ Akram Nash'at Ibrahim, *The Legal Limits of the Criminal Judge's Authority in Sentencing*, Library of Dar al-Thaqafa Publishing and Distribution – Amman – Jordan, p 215.



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In corruption crimes, the legislator did not stipulate special provisions contrary to the general rules set in the Penal Code; hence, one may assert that the criminal judge may resort to the suspension system, since the corruption offenses referred to in Law 06/01 are all of a misdemeanor nature and custodial penalties are pronounced as imprisonment rather than prison. Therefore, the criminal judge is authorized to suspend execution of the penalty in corruption crimes, provided that the convicted person has not previously been sentenced to imprisonment for a felony or misdemeanor of a public-law offense. The criminal judge's authority must observe this legislatively imposed condition. Accordingly, the Supreme Court affirmed in its decision that:

“No courts or councils may, when sentencing to imprisonment or a fine, if the convicted person has previously been sentenced to imprisonment for a felony or misdemeanor of a public-law offense, order in their judgment or decision the suspension of execution of the penalty¹¹.”

Unlike mitigating circumstances, the judge's recourse to suspending execution of the penalty requires justification in the ruling, so that it may be subject to appellate and cassation review. The Supreme Court reinforced this in another decision, stating: “The Court of Assizes' judgment, which lacks any reasoning regarding the suspension of execution of the imposed penalty, is subject to cassation review¹².”

In another jurisprudential ruling, the Supreme Court held that the appellate council is not obliged to provide reasoning when overturning suspension of execution, since it is the judgment ordering suspension that requires special reasoning according to Article 592 of the Code of Criminal Procedure¹³.

It appears that the Algerian legislator benefited from the experience of several countries that prevented suspension of execution in economic crimes, particularly corruption-related ones, as noted in Egyptian and French law until the issuance of Law 11/02/1915, which abolished all provisions that restricted or deprived judges of ordering suspension of execution¹⁴.

The Algerian legislator rightly preserved the criminal judge's authority to freely exercise discretion in sentencing because undue restriction, in our view, does not foster an honest and robust judiciary to confront corruption. A weak or corrupt judge would not hesitate to acquit despite evidence of guilt if they felt unable to order suspension of execution of a penalty they desire to impose for illegitimate reasons. Therefore, it is not, in our belief, appropriate to deprive the judge of the

¹¹ Criminal Judgment of May 17, 1983; Judicial Jurisprudence of 1986, p 85.

¹² Decision No. 79945 dated January 8, 1991; Judicial Journal 1992, Issue 04, p 182.

¹³ Criminal Judgment of May 28, 1981; Collection of Criminal Chamber Decisions, p 123

¹⁴ Akram Nash'at Ibrahim, op, cit, p 246.



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authority to suspend execution or to obstruct its prudent use, which deters malpractices and serves justice.

secondly: Constraints on the Criminal Judge's Authority to Suspend Execution with Regard to the Nature of the Convicted Person

The suspension system is a privilege granted to a category of convicts, namely those who commit a crime for the first time; aiding them by suspending execution is considered salvation from its harms, particularly regarding custodial punishment. Suspension with enforcement serves as a warning to prevent recidivism. Considering the nature of the convicted person is a fundamental idea adopted by criminal legislations. The Algerian legislation embraced this through stipulating entitlement to suspension for those not previously sentenced to imprisonment for a felony or misdemeanor of a public-law offense.

From Article 592 of the Code of Criminal Procedure, it is understood that what prevents the judge from granting suspension is that the convicted person has previously been sentenced to imprisonment for a felony or misdemeanor of a public-law offense. By contrast, the judge has wide authority to grant suspension in cases where:

- If the convicted person has previously been convicted and punished for a contravention, even if by imprisonment, this does not preclude his benefiting from suspension, because Article 592 refers to felonies and misdemeanors.

- If the convicted person has previously been convicted and punished with a fine, whether in felonies or misdemeanors, this does not preclude his benefiting from suspension, because the article refers only to imprisonment penalties, not fines.

- If the convicted person has previously been convicted and punished for special crimes such as military or political crimes, this likewise does not preclude his benefit from suspension, as Article 592 refers to public-law offenses. In the Algerian legislator's view, political crimes, as referred to in Chapter One of Part Three of the Penal Code, titled "Crimes and Misdemeanors Against State Security," are included within political crimes aimed at disrupting public authorities' organization or a state political interest or citizens' political rights, such as treason, espionage, offenses against national defense and economy, assaults, conspiracies, offenses against state authority and territorial integrity, murder and sabotage offenses that harm the state, and offenses contributing to rebellion movements. Military crimes relate to evasion from military service, breaches of honor or duty, offenses against order exemplified by insubordination and abuse of power, in addition to contravening military instructions. Corruption-related economic crimes—embezzlement of property, damage thereto,



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bribery and analogous offenses, offenses related to public procurement, and crimes of concealing corruption offenses—are not connected to public-law offenses in that sense. Since corruption crimes, separated from the Penal Code by a special law (Law 06/01), were enacted to suppress manifestations of corruption in public institutions and bodies and to combat all criminalized acts harming the national economy, it is, in our view, necessary to distinguish between public-law offenses and corruption crimes, as they are economic crimes. Considering that the anti-corruption law did not stipulate conditions for the convicted person to benefit from suspension, one may assert that conviction for a corruption crime does not preclude benefiting from mitigating circumstances under Article 592 of the Code of Criminal Procedure.

From a purely legal application standpoint, one may say that the judge may grant suspension in corruption crimes because Article 592 refers only to public-law offenses. However, this does not align with the seriousness of corruption crimes and their combat, which should have prompted the legislator to intervene with a specific provision in this law to resolve the issue of barring convicted persons in corruption crimes from the suspension system. Since an embezzler, a briber, or a misuser of public funds for personal ends, once convicted, cannot be considered other than malevolent and cannot be granted an exceptional status compared to other offenders, as is done in political and military crimes. They should be deprived of suspension. Yet the judge's authority remains broad in deciding whether the penalty is enforceable or suspended, so long as the legislator has kept the door wide open for discretion.

Thirdly: Constraints on the Judge's Authority to Suspend Execution with Regard to the Nature of the Prescribed Penalty

The criminal judge may pronounce the prescribed or imposed penalty with suspension of execution. This authority is granted by the legislator based on the provisions of Article 592 of the Code of Criminal Procedure. The penalties subject to this discretionary system are the principal penalties, namely imprisonment and fines, and no others. This means that supplementary penalties or security measures are not subject to suspension, and the judge may not order their suspension.

The principal penalty is the term fixed for imprisoning the offender of the contravention, misdemeanor, or even felony that benefited from mitigating circumstances and whose term is set by its minimum and maximum limits, in addition to the financial penalty represented by a fine. Algerian legal scholars raise an issue regarding the nature of the fine prescribed in Article 374 of the Penal Code concerning the offense of issuing a check without sufficient funds: they question the permissibility of suspending execution of this fine, especially since



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Algerian jurisprudence has established the principle that reducing the fine value in check offenses is impermissible, following confirmation by the legislator in Article 374 with the phrase "... a fine not less than the value of the check or the overdraft amount ...". The nature of the fine prescribed for this offense determines the permissibility of suspending its execution. The Supreme Court affirmed that the fine for issuing a check without sufficient funds is a supplementary penalty or security measure, as evidenced by what Professor Fateh Mohamed Al-Tijani mentioned regarding the Misdemeanors and Contraventions Chamber of the Supreme Court¹⁵.

This interpretation conflicts with the manner in which the article frames it as a principal penalty; nevertheless, if one considers the fine for the check offense a principal penalty, it may be imposed with suspension, provided the judge justifies this in the ruling with sufficient reasoning to avoid ambiguity. If one considers it a supplementary penalty or security measure, suspension cannot be ordered, and no justification is required in that event.

A similar issue arises with the fine for the currency exchange offense, which the legislator stipulated in the first amended article following Order 09/06/1996 by virtue of the Order dated 19/02/2003: a fine not less than twice the value involved when it concerns a natural person, and Article 5 stipulated no less than four times the value when it concerns a legal entity.

In corruption crimes referred to in Law 06/01 on combating and preventing corruption, there is nothing preventing suspension of the prescribed fine.

It should be noted that suspension of execution of the penalty is not a right of the convicted person but an optional discretionary matter left to the judge's sovereign decision based on the circumstances of the crime and the offender's personality. Suspension remains a penal penalty recorded in the criminal record (bulletin No. 1 and No. 2) but not entered in bulletin No. 3; it is counted in determining recidivism and does not prevent applying supplementary penalties, bearing court costs, or even civil compensation.

Execution with suspension is conditional upon the convicted person not committing a felony or misdemeanor of a public-law offense within five years from the date of the first judgment sentencing them to imprisonment or custody for such an offense. Suspension is revoked if the beneficiary commits a felony or misdemeanor within five years from the date of the first judgment for a public-law offense, given consideration to special crimes, notably political and military ones¹⁶, as well as misdemeanors. If this felony or misdemeanor carries a penalty of

¹⁵ Judicial Journal 1999, Part Two, p 64.

¹⁶ Ahcen Bouskeïa, A Concise Treatise on General Criminal Law, Dar Houma – Algeria, p 350.



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imprisonment or custody, supplementary penalties or security measures are not considered. If these two conditions are met, suspension is revoked upon the issuance of the new judgment, resulting in execution of the penalty pronounced in the first judgment, then applying the latter penalty independently of the former. The head of the judicial body granting suspension must remind the convicted person that if a new conviction is rendered, the first penalty will be executed without confusion with the second; this procedure is essential, and failure to give this reminder may result in reversal of the decision.

However, the Supreme Court has not been unanimous on this matter: it considered that the provision of Article 594 constitutes an essential procedure and a ground for appeal¹⁷, while in another decision it did not regard it as such, contradicting the first¹⁸.

- The penalty is extinguished by the mere lapse of the probation period without incident: the judicial ruling in a felony or misdemeanor with suspended execution becomes as though it had never existed if the convicted person does not commit a felony or misdemeanor of a public-law offense during five years from that ruling.

- Consequently, the penalty is not recorded in bulletin No. 2 of the criminal record, and any supplementary penalties imposed also lapse.

- In the 10/11/2004 amendment to the Code of Criminal Procedure, the legislator adopted a partial suspension system for the prescribed penalty, whether imprisonment or fine, providing that the judge may sentence the offender to part of the penalty with suspension of execution and the remainder with enforcement.

- However, its effectiveness and utility do not receive a unified stance among Algerian legal è-scholars.

¹⁷ Supreme Court decision, Case No. 57427 dated June 13, 1989; Judicial Journal 1991, Issue 02, p

¹⁸ Criminal Chamber decision June 26, 1994, Case No. 113036, cited from Ahcen Bouskeïa, previous reference, p 351.



Conclusion

- Although corruption crimes, despite being included in a special law (Law 06/01), remain subject to the same criminal judge's authority as delineated by the general provisions in the Penal Code.

- The general tendency of the Algerian legislator moves toward restricting the judge's freedom in sentencing, as evident from the most recent amendment, which marks a phase of tightening compared to previous stages, notably in the 1966 Penal Code and then the 1975 Penal Code.

- The real impetus for the Algerian legislator to regulate certain crimes in special laws, such as corruption crimes, to stiffen their penalties and set limits on judicial discretion, was the increase in criminal phenomena in Algeria in both quantity and severity and the judiciary's underperformance in providing the necessary and firm deterrence.

- This general direction, which prevailed earlier in the Penal Code, was subsequently applied to corruption crimes through their inclusion in a special law. As observed, the judge's authority in determining penalties for these crimes largely derived from the general provisions in the Penal Code, prompting some legal scholars to question the significance of enacting a special law on corruption crimes independent of the Penal Code when it did not depart, in essence, from general principles.

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