

Guarantees of the Right to Defense in Algerian Legislation

Djelaila Dalila¹

Abstract

The accused enjoys a number of guarantees during the trial process. Some of these guarantees relate to the authority bearing the case, which must be independent and impartial. Others pertain to the fundamental principles of criminal procedure, such as the principle of legality, the prohibition of retroactive application of criminal law, and the principle of non bis in idem (not being tried for the same offense twice). Additional guarantees concern the procedural framework of the trial, including the principle of publicity, the requirement to document proceedings, adherence to procedural limits, and the presence of the accused during trial. There are also specific guarantees tied to the right of defense. These include the right of the accused to equal treatment in criminal proceedings by the competent authority, and the right to enjoy the same procedural protections as the opposing party. The accused must be informed of the charges against him and their content, and he has the right to consult with a lawyer and an interpreter if he does not speak or understand the language of the court. Moreover, the accused has the right to hear and cross-examine witnesses, and cannot be forced to testify against himself.

Keywords: *Judicial independence, impartiality, presumption of innocence, principle of legality, guarantees.*

Received: 02.06.2024

Accepted: 12.11.2024

Introduction

The right to defend in Algerian law is a fundamental right granted to the accused, whether a natural or legal person. It allows the individual to defend themselves and prove their innocence. This right is present at all stages of criminal proceedings. It includes the right to be informed of the charges, the right to legal representation, the right to present a defense, and other safeguards that aim to ensure a fair trial.

The Algerian legislator has surrounded this right with a set of guarantees, elevating them to constitutional principles. Most of these guarantees concern the judicial authority and are known as general guarantees. Others relate specifically to the accused as a litigant before the criminal courts, and are referred to as special guarantees.

Ensuring that the accused can exercise their right to defense, supported by sufficient safeguards during criminal proceedings, enhances public trust in the fairness of the justice system. It also reinforces the credibility and integrity of rulings, whether they result in acquittal or conviction.

Thus, this paper raises the following research question: Are the defense guarantees established by the Algerian legislator sufficient to ensure a fair trial?

To answer this question, the research is divided into two main sections:

- The first section discusses the general guarantees.
- The second section explores the special guarantees.

¹ Lecturer A, Faculty of Law and Political Science – University of Ghardaïa, Algeria. Email: djlaila.dalila@univ-ghardaia.edu.dz , Orcid: <https://orcid.org/0009-0006-9276-9387>

Section One: General Guarantees

The right to defend cannot be upheld unless the judiciary is grounded in a set of principles and guarantees that ensure justice and respect for the rights of the accused throughout all stages of criminal prosecution, up to the issuance of a fair verdict.

The Algerian legislator has granted these guarantees constitutional value and ensured their protection. These guarantees include judicial independence, judicial impartiality, and the hierarchical structure of the judiciary (Presidential Decree No. 20/442, dated 15 Jumada al-Awwal 1442 AH, corresponding to December 30, 2020, Official Gazette, Issue No. 82, 2020)

Section One: Judicial Independence

Judicial independence is one of the core constitutional principles upon which the rule of law is based. It is a fundamental condition for achieving justice and safeguarding rights and freedoms. An independent judiciary ensures the right to a fair trial and serves as a protective shield for individuals against the power of the state.

Modern constitutions have affirmed this principle, including the Algerian Constitution of 2020. Article 179 explicitly states: “The judicial authority is independent and exercised within the framework of the law

Subsection One: The Concept of Judicial Independence

The concept of judicial independence lies at the heart of the doctrine of separation of powers. It is the essential guarantee for ensuring justice and legality within the state. Judicial independence means that the judge is free to issue rulings in accordance with the law and professional conscience, without any external influence—whether from the executive or legislative authority, or even from public opinion or the media.

Two main approaches have emerged in defining the meaning of judicial independence: the personal approach and the objective approach.

The personal approach considers that judges are subject to no authority or power in the exercise of their duties except the law and their conscience. No other body or authority may intervene or impose on them what should be decided in any case, whether through orders or instructions (Ahmed Moumni, June 2020, p. 116).

One expression of personal independence is the prohibition against judges joining any political party. Such affiliation may influence their ideas and beliefs. This principle is affirmed in Article 14 of the Judicial Statute (Organic Law No. 04-11 dated September 6, 2004, including the Basic Law on the Judiciary, Official Gazette, Issue No. 57, 2004). A judge is prohibited from joining any political party and from engaging in any partisan activity (Fatima Beltib, p. 289)

The Objective Concept of Judicial Independence The objective concept of judicial independence refers to the independence of the judiciary as an institution. It means that the judicial authority should function independently from the other branches of power. No external body should interfere in its operations, influence its decisions, or issue directives to it.

This concept is closely tied to the principle of separation of powers. It affirms that no other authority may intervene in judicial matters. By contrast, the personal concept is more concerned with judicial impartiality. It focuses on ensuring that the judge exercises their duties freely and without external influence.

Together, these two approaches complement one another. They work jointly to strengthen the independence of the judiciary as a whole.

Subsection Two: Guarantees of Judicial Independence

While judicial independence is a core constitutional principle and a foundation of the rule of law, it cannot be realized in practice without a set of legal and institutional securities. These guarantees are designed to protect judges from any form of pressure or interference, whether from within the executive authority or outside it.

Judicial independence is not merely a theoretical ideal. It is a legal condition that enables judges to carry out their duties without fear, bias, or external influence.

The most important guarantees adopted by the Algerian legislator to uphold judicial independence include the following:

First: Constitutional and Legal Protection of Judges

The Algerian Constitution of 2020 guarantees protection for judges against all forms of pressure or interference. Article 180 clearly provides: “The law protects the judge from any form of pressure or interference that could affect the integrity of their rulings”

In addition, Article 179 affirms that the judiciary is an independent authority. This places a legal obligation on all other branches of power to respect its independence.

Second: Security of Tenure

Judges may not be dismissed, transferred, suspended, or forced into retirement except in accordance with procedures established by the High Judicial Council (Bouchair Ben Youssef, 2017, p. 55).

The Organic Law No. 11-10 on the Organization of the Judiciary provides that judges enjoy security of tenure. No administrative action may be taken against them without the approval of the High Judicial Council.

Third: Independence of the Public Prosecution in Initiating Criminal Proceedings

Although the Public Prosecution is structurally linked to the Ministry of Justice, the law requires it to act only in accordance with the law when initiating and conducting criminal proceedings. No authority is permitted to instruct or influence it in how to handle a judicial case.

Fourth: The Role of the High Judicial Council

The High Judicial Council is the central body responsible for protecting the independence of the judiciary and the judges. It is chaired by the President of the Republic, in his capacity as the guarantor of judicial independence (Khalifa Allawi, 2021, p. 215).

The High Judicial Council is responsible for the appointment, promotion, transfer, and disciplinary measures concerning judges. It also oversees their career progression, free from any political or administrative influence.

Fifth: Judges Are Not Subject to Instructions or Orders

No authority, regardless of its position, may direct judges on how to rule in the cases before them. This is clearly affirmed in Article 3 of Organic Law No. 11-10, which states that the judge is bound only by the law and by personal conviction.

These guarantees demonstrate that independence in the Algerian legal system is not merely a theoretical principle. It is a protected reality, supported by practical mechanisms designed to ensure its implementation—provided that institutional oversight functions effectively and legal safeguards are

properly applied. Any violation of these guarantees undermines public trust in the judiciary and weakens the foundations of the rule of law.

Section Two: Judicial Impartiality

Judicial impartiality is a fundamental principle that complements the independence of the judiciary. It refers to the judge's duty to remain objective and to avoid bias or external influence when carrying out judicial responsibilities.

It is not enough for the judge to be independent. The judge must also be impartial. This reinforces public confidence in justice and protects the rights of all parties in a legal dispute.

Subsection One: The Concept of Judicial Impartiality

The principle of impartiality requires that judges maintain a neutral stance, free from personal inclinations or opinions that may affect the fairness of their judgment. A judge must not favor either party in a dispute—whether due to personal interest, political pressure, or media influence.

This principle serves to protect the right to defend and helps ensure a fair trial (Suleiman Omrani, 2020, pp. 121–122)

Dimensions of the Principle of Impartiality

- **Personal (Internal) Impartiality:** This means that the judge must, in their own mind, remain unbiased and base their judgment only on facts and evidence.
- **Objective (External) Impartiality:** This means that there should be no external indications suggesting that the judge is biased—for example, having a personal relationship or interest with one of the parties.

Subsection Two: Forms of Breach of Judicial Impartiality

The principle of judicial impartiality may be compromised in several ways. The most significant include:

- **First: Combining Judicial Duties with Other Roles** A judge may not combine judicial functions with any executive or political role that might affect impartiality. Algerian laws require judges to be fully dedicated to their judicial work.
- **Second: The Judge's Involvement in the Investigation or Prior Proceedings** If a judge has participated in the investigation stage or previously expressed an opinion on the case, they are not permitted to rule on it later. This is to prevent prior views from influencing the final judgment (Rabah Zerouki, 2018, p. 202)

Third: The Existence of Personal or Interest-Based Connections with a Party

This includes relationships such as kinship, friendship, enmity, or financial interest. Any such connection requires the judge to recuse themselves in accordance with the law. This is established under the Algerian Code of Civil and Administrative Procedure, specifically Articles 200 to 204, which regulate the disqualification of judges.

The principle of federal impartiality complements the principle of independence. It prohibits the judge from acting as a party to the dispute and requires complete neutrality in judgment. The Algerian legislator has taken care to establish legal safeguards to protect this impartiality, through constitutional and legislative provisions, to preserve the integrity of the judiciary.

Section Three: The Principle of Judicial Hierarchy

The principle of judicial hierarchy is one of the fundamental pillars of the modern judicial system. It serves as an effective means to ensure fairness in judicial procedures by allowing decisions to be reviewed through multiple levels of litigation. A multi-tiered judiciary guarantees the parties' right to appeal, reinforces public confidence in justice, and reduces the risk of judicial error.

Subsection One: The Concept of the Principle of Judicial Hierarchy

This principle is based on the existence of several levels or degrees of courts to resolve disputes. Judicial decisions are not final at the first instance but can be reviewed by a higher judicial authority. This is reflected in the structure of primary courts, followed by judicial councils, and ultimately the supreme court (Abdelaziz Tarih Sharaf, 2016, pp. 65–68).

Manifestations of Judicial Hierarchy in the Algerian Judicial System:

- **First Level:** The Primary Courts (Ordinary Courts).
- **Second Level:** The Judicial Councils (Appellate Courts).
- **Third Level:** The Supreme Court (Review of Law, not Facts).

In 2016, the Algerian legislator introduced, through a constitutional amendment, the principle of two-level litigation in criminal matters. Previously, criminal judgments were issued as final first-instance decisions, not subject to appeal. Article 166, paragraph 2, now states: “The law guarantees two-level litigation in criminal matters and determines the procedures for its implementation (Law No. 01/16 dated 26 Jumada al-Awwal 1437 AH, corresponding to March 6, , containing the Constitutional Amendment, 2016)

Subsection Two: Legal Consequences of the Principle of Judicial Hierarchy

The application of the principle of democratic hierarchy results in several legal consequences that affect the rights of litigants and the principles of a fair trial. The most important are:

First: Guaranteeing the Right to Appeal This principle allows any party harmed by a non-final judgment to challenge it before a higher authority. This upholds the principles of justice and the right to defend, while preventing arbitrary rulings.

Second: Ensuring Internal Judicial Review Higher courts oversee decisions issued by lower courts, both in terms of procedural correctness and the application of law. This supervision enhances the quality of judicial rulings (Mohamed Amara, 2020, p. 139).

Third: Finality of Judgments after Exhausting All Levels of Litigation Once all levels of litigation have been exhausted, judgments acquire the force of *res judicata*. They cannot be reopened except in exceptional cases, such as through a request for retrial or an appeal to the Court of Cassation (Nour Eddine Omrani, 2018, pp. 177–180).

The principle of democratic hierarchy is considered one of the procedural guarantees aimed at achieving justice and avoiding judicial errors at the first instance level. It also strengthens citizens' confidence in the judicial system and grants litigants a fair chance to defend their rights.

Section Two: Special Guarantees

Special guarantees for the accused represent one of the most important mechanisms for ensuring a fair trial. These guarantees consist of a set of rights protected by law, starting from the moment charges are brought until the issuance of the final judgment. Sometimes, these rights even extend beyond the trial phase. These

guarantees are not privileges but essential protections of human dignity and fundamental rights in the face of state authority during public prosecution.

International instruments, such as the International Covenant on Civil and Political Rights (Article 14), as well as national constitutions—chief among them the 2020 Algerian Constitution (Articles 55 to 61)—have enshrined various rights for the accused. These rights include the right to defend, the presumption of innocence, equality before the judiciary, the right to appeal, and the independence and impartiality of the judiciary.

This section aims to examine the most prominent special guarantees granted to the accused. It presents these guarantees in detailed parts to highlight the extent to which Algerian legislation enshrines criminal justice principles. Comparisons with international standards are made where relevant.

First Requirement: The Principle of Presumption of Innocence

The principle of presumption of innocence is one of the highest principles underlying modern criminal justice. It forms the cornerstone of protecting the accused from abuse and provides a fair starting point to face accusations. This principle holds that every person is considered innocent until proven guilty through a fair trial. Judicial and security authorities must treat suspects accordingly, without assuming guilt or treating them as convicted before a final judicial ruling.

The Algerian legislator enshrined this principle in Article 58 of the 2020 Constitution, which states: “Every person shall be presumed innocent until legally proven guilty in a fair trial that guarantees all necessary safeguards for defense.”

This principle is also affirmed in numerous international documents, such as Article 11 of the Universal Declaration of Human Rights and Article 14(2) of the International Covenant on Civil and Political Rights.

From this principle arise significant legal consequences that ensure a balance between the power of prosecution and the rights of defence. These include: exempting the accused from proving innocence, interpreting doubt in their favor, and prohibiting acts or statements that undermine the presumption of innocence before conviction.

To study this principle comprehensively, this requirement is divided into two parts: its concept and its direct consequences in the judicial process.

First Branch: The Concept of the Presumption of Innocence

The presumption of innocence is a fundamental principle in criminal law and procedure. It means assuming the accused's innocence until proven guilty by a final court judgment. Various constitutions and international treaties have established this principle as a fundamental guarantee of criminal justice. These include Article 11 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, and Article 58 of the Algerian Constitution.

Because the presumption of innocence is a fundamental rule for a fair trial, it produces several legal consequences that regulate the behavior of all actors in criminal proceedings. This ranges from investigative authorities to the prosecution and the judiciary. These consequences include safeguards that protect the accused's dignity and prevent harm before a final conviction. Among the most important are: placing the burden of proof on the prosecution, prohibiting coercion or torture to obtain confessions, and requiring judicial authorities to act with neutrality and impartiality during the trial.

Hence, studying the results of the presumption of innocence is crucial to understanding its impact on rules of evidence and trial procedures. This requires examining the most significant legal and practical effects it entails.

Second Branch: Legal Consequences of the Principle of Presumption of Innocence

The principle of presumption of innocence entails a set of legal consequences that strengthen the protection of the accused and guarantee fair treatment. These include:

1. Exemption of the accused from proving their innocence:

The presumption of innocence is a fundamental criminal justice rule that produces a direct effect: the accused are not required to prove their innocence. The entire burden of proof lies with the prosecution or the accusing party. The accused cannot be asked to prove that they did not commit the crime. Conviction must be based on strong evidence, and any doubt must always be interpreted in favor of the accused (Saad Jaballah, 2019, pp. 92–95)

By principle, the accused is presumed innocent until proven guilty by a final judicial ruling. Any action that contradicts this presumption is considered a serious violation of the right to defend and a breach of procedural legality.

The Algerian Code of Criminal Procedure does not place any burden on the accused to prove their innocence. Instead, it grants the right to remain silent and to refrain from responding, without this silence being interpreted as an implicit confession.

2. Limiting Judicial and Administrative Authorities

No judge, investigator, or authority may adopt or express any stance suggesting that the accused is guilty before a final verdict is issued.

3. Interpreting Doubt in Favor of the Accused

This is a complementary principle to the presumption of innocence. It requires that, in cases where there is doubt about the facts or the evidence, the judgment must favor the accused, who should be considered not guilty.

The principle of *in dubio pro reo*—meaning that doubt must be interpreted in favor of the accused—is a direct outcome of the presumption of innocence. It is a well-established rule in criminal law and criminal procedure. It means that if the judge has any uncertainty or reasonable doubt about whether the crime occurred or whether the accused committed the act, a verdict of acquittal must be issued. The presumption is that a person is innocent. Any doubt regarding guilt must be resolved in favor of the accused. A conviction must not be based on probability, but on judicial certainty supported by conclusive evidence.

The Illegitimacy of Coerced Confessions

Any form of physical or psychological coercion used to compel the accused to confess or to provide evidence of their innocence constitutes a violation of human rights and renders the proceedings invalid (Articles: 51 bis, 100, 105 from the Algerian Code of Criminal Procedure)

Limiting the Judge's Discretion in Evaluating Evidence

A criminal judge may not base a conviction solely on suspicions or on the defendant's failure to present exculpatory evidence. The judgment must rely on conclusive evidence submitted by the prosecution (Surur, 2016, p. 129).

Limited Exceptions Although the accused is not required to prove their innocence, partial evidentiary burdens may be placed upon them in specific cases. These include situations where the defense is based on a legal excuse or a criminal defense, such as insanity, coercion, or self-defense. However, such instances are

not considered a violation of the presumption of innocence. Rather, they fall within the scope of voluntary defensive cooperation (Saleh, 2020, pp. 188–190)

Section Two: Equality before the Judiciary

Equality before the judiciary is one of the essential principles that uphold the rule of law and justice among individuals without discrimination. It means that all persons, regardless of gender, social status, or political affiliation, must enjoy equal rights to access the courts and to receive a fair trial under the same rules and procedures.

The 2020 Constitution of Algeria affirms this principle in Article 56, which states: “All are equal before the law, and no discriminations, regardless of its cause, may be invoked to justify inequality in treatment before the courts.”

International instruments have also guaranteed this right. For example, Article 7 of the Universal Declaration of Human Rights states: “All are equal before the law and are entitled without any discrimination to equal protection of the law.”

The importance of this principle lies in ensuring that no person is denied justice due to their status, influence, or poverty. It reinforces public trust in the judiciary and prevents the misuse of judicial authority.

This section will address the topic through two main parts:

Part One: The Constitutional and Legal Basis of Equality Before the Judiciary

Equality before the judiciary is clearly grounded in both constitutional and legal texts, particularly in the 2020 Constitution of Algeria:

- Article 61 affirms: “All are equal before the judiciary.” This provision enshrines equality as a binding constitutional principle for all public authorities.
- Article 40 ensures: “The state guarantees protection for any person who has suffered harm resulting from a judicial error. In the Code of Criminal Procedure, litigants are treated with the same rights and protections without discrimination, whether they are defendants or victims (Khalifa, 2021, p. 189)
- The law does not differentiate between individuals based on their social or professional status when applying procedures of prosecution or trial.
- The Law on the Organization of the Judiciary (Organic Law No. 11-10) affirms the independence and impartiality of the judge. This reinforces equality among all parties in the case.

Part Two: The Right of Defense and Its Specific Guarantees for the Accused – in Detail

The right of defense is one of the clearest outcomes of the presumption of innocence. It is also one of the most fundamental guarantees granted to the accused during all stages of criminal proceedings. This right is recognized in international instruments, such as Article 14 of the International Covenant on Civil and Political Rights. It is also guaranteed by the Algerian Constitution (Article 59 of the 2020 Constitution) and the Code of Criminal Procedure.

The right of defense includes a set of elements designed to ensure that the accused can defend themselves effectively and fairly.

First: Elements and Guarantees of the Right of Defense for the Accused

The Right to Be Informed of the Charges

The accused must be clearly informed of the charges brought against them. This is a necessary condition to allow the person to prepare an adequate defense (Shawqi, 2021, p. 173).

The accused must be promptly informed, in a language they understand, of the nature of the charge and the reasons behind it.

This element is essential for the preparation of the defense and serves to prevent surprise or unfair advantage.

Even after conviction, the sentenced person retains legal guarantees. These include the right to humane treatment and the right to challenge the conditions of execution before the competent authority (the judge responsible for the enforcement of sentences) (Hijazi, 2018, p. 215)

The Right of the Accused to Remain Silen

Once the court presents the charge corresponding to the alleged crime, supported by evidence suggesting that the accused may have committed it, the contents of the charge sheet must be read to the accused. The court must also explain any part that requires clarification. If the accused does not admit to the charge or if the confession is flawed in any way, the court proceeds to hear the testimony of defense witnesses and any other evidence the accused has requested to refute the accusation. After this stage, the court listens to the responses of the parties, including the prosecution and the defense (Mamoun, no date, p. 319).

It follows from the above that the accused must always be granted full freedom to speak in order to deny the charges brought against them. They must be allowed to use all means of defense that arise from this right. At the same time, the accused has the right to remain silent if they believe that doing so serves their interest.

This also means that the court has the freedom to ask any questions it deems appropriate to uncover the truth, whether before or after the charge is issued. The accused has the choice to answer these questions or not. Refusing to answer cannot be considered evidence against them. Silence takes two forms:

a. Natural Silence: This occurs when the accused is deaf or mute. If the person can write, the judge simply writes down the question, and the accused responds in writing. If the person cannot write, the judge appoints an interpreter who is skilled in sign language.

b. Intentional Silence: This refers to silence chosen by the accused. It means the person refuses to answer the questions asked by the criminal judge, entirely by their own will, without being affected by any health condition or natural impairment (Sadiq, 1986, p. 129)

Considering the accused's refusal to answer as a presumption of guilt is regarded as an indirect form of coercion. The court is not permitted to treat the accused's silence as evidence against them (Al-Hadith, 2005, p. 163)

The status of the accused differs from that of a witness. It is a right granted to the accused, not an obligation imposed upon them. Only the accused can decide whether to exercise this right or not. If the accused believes that remaining silent is the best means of defense, they have the absolute right to refuse to answer any questions posed to them. The criminal law interprets the accused's silence as a presumption of guilt.

Therefore, conviction cannot be based solely on the accused's silence or refusal to cooperate. Silence does not constitute proof of guilt; Rather, it is an exercise of a lawful right.

The Right to Legal Counsel

The right to legal counsel is among the most important rights guaranteed to the accused. The following section will address the definition of a lawyer and the significance of their presence.

a. Definition of a Lawyer and the Importance of Their Presence

A lawyer is defined as a person who practices law or is registered with the Bar Association. The lawyer represents their client before judicial and disciplinary bodies, defending the client's rights in accordance with the law governing the legal profession. They also provide legal advice (Mahda, 1990-1991, p. 53) A lawyer is anyone who defends the suspect, the accused, or the person responsible for civil rights. This role is authorized by law, which grants specific rights and licenses derived from the lawyer's function in the criminal proceedings (Gay, 2003, p. 33)

The presence of a lawyer becomes even more important when the suspect is illiterate (Al-Mulla, 1986, p. 28). The significance of a lawyer's presence is reflected in the psychological benefit it provides. Knowing that legal assistance is available helps the suspect gain calmness and mental stability. The lawyer's presence supports the suspect in maintaining composure during questioning and prevents involuntary confessions. There is also a technical benefit, which stems from the lawyer's understanding of the legal aspects of the procedures taken against the suspect. This knowledge helps restore balance between the suspect's position and the authority conducting the procedures.

The preventive effect lies in the fact that having a lawyer present hinders any intention of misconduct or unfairness in the process. It protects the suspect from humiliation or contempt.

b. The Legal Nature of Seeking Legal Counsel

To clarify the nature of seeking legal counsel, it is necessary to determine whether this action constitutes a right or a freedom. To address this question, it is useful to apply the fundamental distinctions between rights and freedoms to the context of defense rights. It is concluded that seeking legal counsel is primarily a right rather than a freedom.

A right applies to a specific or determinable subject, whereas a freedom does not have a specific subject or clear boundaries; It refers to general conditions without defined limits. Here, the right granted to the suspect or accused is directed specifically at the person of the lawyer, whether the lawyer is appointed or not.

The suspect or accused is informed of their right to seek legal counsel. After that, they have full freedom to exercise this right or not.

A right is always accompanied by an obligation toward others, whether specific individuals or society at large. In contrast, general freedoms do not entail such obligations (Hosni, 1995, p. 12) If the accused chooses to exercise their right and seeks the assistance of a lawyer, the lawyer—who represents another person—assumes certain obligations, such as defending the interests of the accused and maintaining professional confidentiality. On the other hand, if legal assistance were merely considered a freedom, it would not involve any corresponding obligation.

Having reached this point, it can be concluded that seeking legal counsel is indeed a right It is more a right than a freedom (Al-Halabi, no date, page 34) As a right, the state is obligated to enable access to legal counsel. This obligation appears in two main forms. The first is ensuring the presence of a lawyer at all stages, including the preliminary investigation, where the lawyer's presence is essential. The second is guaranteeing the exercise of this right even in the absence of financial means, through legal aid.

Although legal aid is granted by law to the accused, the Algerian legislator, after recognizing the suspect's right to consult a lawyer, did not clarify whether this right includes access to legal aid. This raises the question of whether legal aid can be applied during the preliminary investigation stage.

By referring to the law on legal aid, it becomes clear that this right is limited to individuals whose financial situation prevents them from claiming or defending their rights before the courts. From examining the term “judiciary,” it becomes clear that legal aid cannot be applied during the preliminary investigation stage, as it does not constitute a judicial authority. It would have been preferable for the legislator to avoid this ambiguity, clarify the issue, and include a specific provision (Article 2 of Law No. 13-07 dated 24 Dhu al-Hijjah 1434 corresponding to October 29, 2013 regulating the legal profession, Official Gazette No. 55). The phrase: “Contact with the lawyer chosen or appointed under legal aid.”

Section Three: The Principle of Legality

The principle of legality (Principe de legalite) is one of the main pillars of modern criminal law. It means that there is no crime and no punishment without a prior legal provision. In other words, a person cannot be punished for an act that was not clearly defined as a crime by law at the time it was committed, nor can they be subjected to a penalty that was not previously established by law.

This principle has been affirmed in the Algerian Constitution and in various criminal and procedural laws. It serves as a safeguard for individual freedoms and a barrier against abuse of power by legislative, judicial, or executive authorities. To understand this principle fully, its definition will be addressed first, followed by its practical implications in criminal law.

Section One: The Concept of the Principle of Legality

The principle of legality is one of the most important foundations of the contemporary criminal justice system. It is central to the protection of rights and individual freedoms and a key element in ensuring fair trials and the rule of law. This principle states that no act can be considered a crime, and no punishment can be imposed, without a prior legal text. This obliges public authorities, especially the judiciary, not to pursue or punish individuals unless a clear legal provision criminalizes the act and prescribes an appropriate penalty.

The origin of this principle can be traced back to modern legal thought following the French Revolution. It emerged as a reaction to the abuse of power and was later enshrined in the constitutions of most countries, including Algeria. Article 58 of the 2020 Algerian Constitution clearly states: “No person may be convicted except by virtue of a law enacted before the commission of the punishable act.”

The principle of legality is not limited to criminal offenses and penalties. It also applies to criminal procedures. No action or restriction on personal freedom may be taken unless authorized by law. This strengthens the protection of legal certainty and prevents arbitrary decisions or unjustified interpretations that restrict freedoms.

Therefore, understanding the principle of legality requires examining its legal foundations, general content, and its scope within Algerian criminal legislation. These aspects will be addressed in this section.

1. Constitutional and Legislative Basis of the Principle

The 2020 Algerian Constitution, in Article 58, paragraph 2, provides:

- “No person may be convicted except by virtue of a law enacted before the commission of the punishable act.”

The Algerian Penal Code also affirms this in Article 1:

- “No one may be sentenced to a criminal penalty unless it is provided for by law (Zarrouki, 2020, pp. 78–80).

2. Dimensions of the Principle

The principle of legality includes several key aspects:

- Legality of criminalization: An act is not considered a crime unless it is defined as such by law.
- Legality of punishment: No penalty may be imposed unless it is clearly prescribed by the legislator.
- Legality of procedures: Criminal procedures may only be applied if they are established by law. This includes both prosecution and trial procedures.

3. Purpose of the Principle

- To protect fundamental freedoms from arbitrary actions.
- To prevent the executive or judiciary from creating crimes or penalties through personal interpretation.
- To ensure legal certainty and security for all citizens (Ben Nasser, 2021, p. 63).

Section Two: Consequences of the Principle of Legality

The enforcement of the principle of legality leads to several important legal outcomes that serve to protect individual rights and regulate the exercise of punitive power:

1. Prohibition of Retroactive Punishment

- A criminal law may not be applied retroactively, unless it is more favorable to the accused (principle of the more lenient law).
- This is confirmed in Article 2 of the Penal Code, which states:
- *"The more favorable law to the accused shall apply if it is issued after the act and before the final judgment."*

2. Prohibition of Analogy in Criminal Law

- It is not permitted to expand the interpretation of criminal provisions or apply them by analogy.
- This ensures the preservation of legal certainty (Bousadia, 2019, pp. 55–57).
- Any ambiguity in the legal text must be interpreted in favor of the accused.
- Judges are prohibited from filling legislative gaps through personal interpretation.

3. Limitation of Judicial Authority

- The judge applies the law as written.
- The judge does not have the power to create crimes or determine beyond what is stated in legal penalties.
- The role of the judge is to apply the law, not to make it (Khalif, 2020, pp. 41–44).

4. Guaranteeing the Principle of Legal Certainty

This principle means that an individual knows their actions are not considered crimes unless they are clearly criminalized by law. This understanding reinforces trust in the law and the legitimacy of authority.

Conclusion

The safeguards granted to the accused are fundamental pillars of a fair trial. They uphold the principle of respecting human dignity and create a legal environment that balances society's interest in combating crime with the individual's right to defend themselves. Through the Constitution and procedural laws, the Algerian legislator has emphasized the importance of respecting the presumption of innocence, the principle of legality, equality before the judiciary, and the independence and impartiality of the judicial authority. These are essential guarantees that must not be compromised.

Despite these guarantees being enshrined in legal texts, their practical application faces challenges. Continuous monitoring and ongoing reform are necessary to ensure the effectiveness of these principles and to achieve the justice sought.

Key Findings

- **Presumption of Innocence** This is the cornerstone of criminal justice. It places the burden of proof solely on the prosecution, without requiring the accused to prove their innocence.
- **Principle of Legality** Ensures no individual can be criminally prosecuted except based on a clear legal provision. This respects individual freedom and prevents arbitrary criminalization and punishment.
- **Equality Before the Judiciary** A constitutional principle that guarantees all individuals equal treatment before the courts without discrimination.

Recommendations

Strengthen continuous training for judges and judicial staff on human rights and international standards of a fair trial.

Enhance judicial and administrative oversight to ensure the proper application of guarantees afforded to the accused, especially during investigation and trial stages.

Review procedural laws that may affect the presumption of innocence, particularly regarding pretrial detention and arrest procedures.

Ensure free legal defense for all accused who cannot afford it and activate the role of the lawyer from the very first moments of detention to protect defense rights.

Foster a culture of respect for the accused's rights among law enforcement through legal education and awareness of criminal justice principles.

References

- Abdelaziz Tarih Sharaf. (2016). A Concise Guide to the Algerian Judicial Organization. Algiers: Houma Publishing House.
- Ahmed Moumni. (June 2020). The Principle of Independence of the Administrative Judiciary as a Guarantee for Upholding the Principle of Legality in Light of Algerian Legislation, Journal of Law and Local Development, Research Laboratory for Law and Local Development (Vol. Volume 2, Issue 2).
- Articles: 51 bis, 100, 105 from the Algerian Code of Criminal Procedure.(sd).
- Bouchair Ben Youssef. (2017). The Algerian Judicial System, . Houma Publishing House

- Fatima Beltib. (sd). Judicial Neutrality under the Principle of Judicial Independence: A Jurisprudential and Legal Study, Journal of Scientific Research and Islamic Studies, Sharia Laboratory, University of Algiers 1 (Vol. Volume 9, Issue 2).
- Khalifa Allawi. (2021). Constitutional Law and Political Institutions. Al-Huda Publishing House.
- Law No. 01/16 dated 26 Jumada al-Awwal 1437 AH, corresponding to March 6, containing the Constitutional Amendment.(2016).
- Mohamed Amara. (2020). Administrative Judiciary in Algeria. Dar Al-Maarefa.
- Nour Eddine Omrani. (2018). Commentary on the Code of Criminal Procedure. Algiers: Houma Publishing House.
- Organic Law No. 04-11 dated September 6, 2004, including the Basic Law on the Judiciary, Official Gazette, Issue No. 57.(2004).
- Presidential Decree No. 20/442, dated 15 Jumada al-Awwal 1442 AH, corresponding to December 30, 2020, Official Gazette, Issue No. 82.(2020).
- Rabah Zerouki. (2018). Independent and Neutral Judiciary in the Algerian Constitution, Journal of Legal and Political Research, Issue 3.
- Saad Jaballah. (2019). Principles of Criminal Justice. New University Publishing House.
- Suleiman Omrani. (2020). Principles of Criminal Justice in Algerian Law. Algiers: Houma Publishing House.
- Ahmed Ghai. (2003). Guarantees of the suspect during preliminary investigations. Algeria: Dar Houma for Printing, Publishing and Distribution.
- Al-Hadith, A. F.. (2005). The right of the accused to a fair trial: a comparative study. Amman, Jordan: Dar Al Thaqafa for Publishing and Distribution.
- Al-Halabi, M.A.(undated). Guarantees of Personal Freedom During Investigation and Evidence in Comparative Law. Kuwait: That Al-Salasil Publications.
- Article 2 of Law No. 13-07 dated 24 Dhu al-Hijjah 1434 corresponding to October 29, 2013 regulating the legal profession Official Gazette No. 55.(sd).
- Ben Shenin Ben Nasser. (2021). A Concise Explanation of the Algerian Penal Code, Part One. Algeria: Dar Houma.
- Boussada, A.A.. (2019). Criminal Policy in Algerian Law. Algeria: Dar Al-Khaldouniya.
- Hosni, M.N.. (1995). Explanation of the Criminal Procedure Code. Egypt: Dar Al Nahda Al Arabiya.
- Khalil Shawqi. (2021). Explanation of the Algerian Code of Criminal Procedure, Part One. Algeria: Dar Al-Huda.
- Zarouki Saleh. (2020). Principles of Criminal Procedure in Algerian Legislation. Algeria: Dar Al-Ulum Publishing.
- Zrouki, S. (2020). Principles of Penal Code, General Section. Algeria: Dar Al-Ulum Publishing.
- Sami Sadiq Al-Mulla. (1986). The Confession of the Accused. Egypt: International Press.
- Sadiq, S(1986). Al-Mulla, Sami Sadiq Al-Mulla, Confession of the Accused. Egypt: International Press.
- Abdel Rahman Khalif. (2020). Algerian Penal Code - General Principles. Algeria: Dar Al-Ma'rifa.
- Abdel Fattah Bayoumi Hegazy. (2018). Human Rights in Criminal Procedure. Dar Al Fikr Al Jami'i.
- Alawi Khalifa. (2021). Constitutional Law and Political Institutions. Algeria: Dar Al-Huda.
- Fathi Sorour. (2016). Explanation of the Criminal Procedure Code. Cairo: Dar Al Nahda Al Arabiya.
- Mamoun, M(undated). Criminal Procedures in Egyptian Legislation. Dar Al Fikr Al Arabi.
- Mohamed Mohda. (1990-1991). Guarantees of the Suspect During Preliminary Investigations, Part Two. Algeria: Dar Al-Huda, Ain Mlila.