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From Circumstantial Legislation to Civilianisation: A Century of Reforms in French Military Justice (1850–1928)

Introduction

As Eugene Fidell recently stated, "the *raison d'être* for military law is the need to control the violence of war and impose discipline in the ranks. Its central theme is the tension between armed conflict and the rule of law, a tension that the substantive law and procedural rules of military law attempt to address".[1] The period from 1850 to 1928 was an important one in the history of French military justice regarding this tension between discipline and justice. It began with the introduction of the 1857 Code of Military Justice for the Army (hereafter the 1857 Code) which reflected the political desire to modernise the law and procedures that had been in force since the French Revolution, to maintain an inflexible system of military justice, but also to bring military justice and civilian justice closer together – that is to say to "civilianise" military justice. Indeed, since the French Revolution, the civilianisation of military justice had been seen by many reformers as a means of putting an end to the peculiarities of military justice, which had long remained an autonomous legal system with little civilian input, and which had been jealously guarded by the military since the Middle Ages. For those reformers, only civilianisation, in other words, the adoption of civilian criminal law norms and procedures by the military justice system, would ensure that the latter respected the fundamental principles of justice and the rule of law. This was one of the main goals pursued by the 1857 Code's drafters. Nonetheless, a few decades later France engaged in two high-intensity wars with its German neighbour, and both had a dramatic impact in respect to basic principles of justice in wartime.

Additionally, the French Army underwent a significant transformation from a small, professional standing army to a national army (known as the *"armée-nation"*), which required all citizens to take up arms and join the active army upon mobilisation. This consequently increased the number of persons subject to military justice. Meanwhile, during peacetime, several military justice scandals, and affairs, such as the judicial suppression of the Paris Commune, the Dreyfus

1 Eugene Fidell et al., *Military Justice Cases and Materials, Teacher's Manual* (Durham: Carolina Academic Press, 2012), 1.

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affair and the "Biribis" scandal in North Africa had eroded public confidence in military justice and often divided French society. For a century, debates, controversies, and criticisms had arisen due to war and divisive incidents. Critics highlighted concerns regarding the composition of military courts, their incompetence, their lack of independence from the military hierarchy or government, the high command's judicial power, the severity of penalties, apparent injustices, and anachronistic procedures. Consequently, military justice was constantly adapted to political or operational circumstances through successive reforms and special legislations. This decisive period ended with the introduction of the 1928 Code of Military Justice, which was a significant step towards ensuring greater independence and impartiality in French military justice. It transformed the way justice for military personnel was perceived in France and gave birth to the French hybrid model of military justice that still exists nowadays. In other words, between 1850 and 1928, from one code to another, French military justice underwent a process of 'civilianisation' – a meandering path – with the aim of striking a balance between military discipline and the rule of law.

1 The 1857 Code

The 1857 Code was drafted by a commission composed of two generals, four members of the *Conseil d'Etat*, and Victor-Adrien Foucher (1802–1866), who was an advocate at the *Cour de cassation* in Paris and Victor Hugo's brother-in-law.[2] This code was at once a code for the organisation of military justice (Organisation and Jurisdiction of Military Courts, Books I and II), a code of military criminal procedure (Procedure before Military Courts, Book III) and a military criminal code (Penalties, Book IV). At the time, military justice served the same purpose as it still does today: to enforce discipline and obedience within the armed forces for the sake of military effectiveness. Victor Foucher wrote in his *Commentaries* on the 1857 Code: "[in] the certain, swift, calm, moderate but firm repression of the slightest offence, the question of obedience, that is to say, discipline, that is to say the whole strength of the armies, is at stake".[3] However, the jurisdiction of military courts was much broader than it is today. Indeed, in the first half of the nineteenth century, two popular revolts in Paris (1830, 1848) toppled well-established political regimes, while ideological and social divisions weakened successive gov-

2 See Capitaine R., *La réforme du code de justice militaire* (Paris: Chapelot & Cie, 1899), 3.

3 Victor Foucher, *Commentaires sur le Code de justice militaire pour l'Armée de terre* (Paris: Firmin Didot Frères, 1858), 2.

ernments. The newly established Second Republic promulgated the State of Siege Act (*Loi sur l'état de siège)* of 9 August 1849, which allowed the National Assembly to declare a state of siege "in the event of imminent danger to internal or external security" (Art. 1). It could thus be used to suppress any revolt or popular uprising. The Act granted the army complete authority to maintain order and gave military courts "jurisdiction over crimes and offenses against the security of the Republic, the constitution, public order, and peace, regardless of the status of the main perpetrators and accomplices" – including civilians (Art. 8). To summarise, the missions of military justice were to maintain discipline within the armed forces and uphold political order within national boundaries, hence its separateness and distinctiveness from civilian justice.

Nonetheless, before 1857, the law was a scattered set of heterogeneous – and sometimes obsolete – pieces of legislation mostly dating back to the French Revolution. As Louis Tripier noted in his Commentaries on the Military Code (1857), "the military criminal laws were so numerous, so confused and so incoherent that there had long been calls for a code of military justice".[4] Jacques Langlais, who presented the bill for debate to the French Parliament, said in his speech: "Military legislation, instead of presenting itself in the simple and logical form of the French spirit which has made our codes so popular in Europe, offers in truth only the image of confusion".[5]

That is why the commission was given the task of drafting a new code of military justice. Its mission was to equip military judges with a range of prophylactic penalties and special procedures that would enable them to dispense the exceptional justice expected of them and to effectively punish any threat against the political regime and military discipline. The government also requested an orderly, exhaustive, and up-to-date work from the commission, to guide nonprofessional judges. Foucher wrote: "the French army, which is a source of pride for the country due to its age-old glory, is granted the unique military law it deserves by Emperor Napoleon III".[6] Langlais added, grandiloquently: "[the] code of military justice is the crowning achievement of military legislation in France".[7] But be-

4 Louis Tripier, *Code de justice militaire pour l'armée de terre expliqué par l'exposé des motifs* (Paris: Mayer-Odin, 1857), 5.

5 Recueil Duvergier, *Collection complète des lois, décrets, ordonnances, règlements et avis du Conseil d'Etat*, Vol. 57 (Paris: Charles Noblet, 1857), 339.

6 Foucher, *Commentaires*, 2.

7 Duvergier, *Collection (1857)*, 335.

cause the code was still voluminous, a nine-page abstract was sent by the Ministry of War to all generals commanding military divisions.[8]

In the 1857 Code, military justice remained in the hands of uniformed judge because, as Langlais said:

> The army is governed by its own duties and rules; it is therefore natural that those who judge should be men who know them and have an interest in defending them. It is only before these judges, these peers who know its customs, who understand its language, who know the duties they themselves perform within this military family, that the guilty party can find leniency without danger.[9]

Nonetheless, the drafters of the code also aimed to modernise, humanise, and civilianise military criminal procedure. Their goal was to incorporate mechanisms for protecting the rights and freedoms guaranteed by ordinary law into the procedure followed by councils of war (*conseils de guerre*). The military justice system was structured hierarchically and included three types of courts: permanent councils of war (which convened in each of the territorial military divisions and had jurisdiction in both peacetime and wartime), councils of war for armies (*conseils de guerre aux armées*), which had jurisdiction when an army corps was in motion on national territory or abroad, and councils of war in places of war, towns, and departments under siege in wartime.[10] The code also established military courts of appeal (*conseils de révision*).

In the drafters' eyes, the new code had to be worthy of nineteenth century France, by striking a balance between military discipline and justice: "the proper administration of justice, the first need of peoples and the first duty of governments, is at least as necessary for an army as it is for the nation itself," noted Foucher.[11] But he might also have been aware that the provisions of the code would apply not only to soldiers in peacetime and wartime, but also to civilians in the event of an uprising.

In concrete terms, the drafters identified and fixed all formal and substantive defects in the existing law. They addressed the issues of volume and obsolescence. According to Foucher, "it is essential to replace the chaos of such uncertain provisions with a single body of legislation".[12] They abolished unnecessarily harsh and humiliating penalties: "[past] legislations often pronounced an invariable and in-

8 The abstract is to be found in Amédée le Faure, *Les lois militaires de la France commentées et annotées* (Paris: Dumaine, 1876), 227–235.

9 le Faure, *Les lois militaires*, 338.

10 The list of permanent wartime councils was set out in the decree of July 18, 1857: Paris, Caen, Lille, Mézières, Metz, Strasbourg, Lyon, Toulon, Toulouse, Brest, Oran, and Bône.

11 Foucher, *Commentaires*, 1.

12 Foucher, *Commentaires*, 15.

flexible sentence, ignoring the varying degrees of crime, and made the judge an instrument pushed towards impunity to avoid becoming cruel".[13]

However, the main innovation introduced by the 1857 Code was the modelling of the procedure followed by military courts on the civilian procedure. Langlais summed up the spirit of the code:

> Legislation will not meet the needs of the army if it does not defend this life-saving principle of discipline. Hence the need to make the ordinary rules of procedure more flexible and adaptable. But speed must not exclude protective principles. Military personnel are men, they are citizens. Like the rest of us, they are entitled to all the guarantees that apply to the accused.[14]

Therefore, the 1857 Code granted the right to a fair and adversarial trial, access to information, legal counsel, witnesses, and the right to appeal. This helped to ensure that civilian and military procedures were on the same page. As in civilian procedure, military proceedings were divided into an investigation phase and a trial phase, and two officers performed the functions of prosecutor and investigating judge.

Nonetheless, the civilianisation of military justice had some limits. Because it was governed by specific legal concerns, such as discipline, good order, and deterrence (to prevent any harmful effect that an offence might have on the troops), military law had to remain a separate body of law. Hence the drafters' will to maintain a special court system and some exceptions to the ordinary law. Foucher wanted his code to respond to "all needs and all the requirements of military life".[15] Langlais said at the Parliament:

> Military personnel have a dual character. A soldier is a citizen, which is the source of his drive and courage; it is his life, his morality, and he remains under the sway of those common rules which concern universal morality and universal duties. But the fatherland has given him a special mission; he is a soldier, and this gives rise to special duties for him, which are governed and protected by special rules.[16]

Specifically, legal deadlines were shorter than in ordinary proceedings, especially during wartime. Similarly, sentencing depended on time and place (peacetime or wartime, facing the enemy or not, on national territory or abroad, etc.). By and large, the code was also severe in its punishments, especially for offences such as desertion, absence without leave, and refusal to obey orders. In the same way, although the 1857 Code referred to the penal code for the punishment of ordinary

13 Foucher, *Commentaires*, 26.
14 Duvergier, *Collection (1857)*, 343.
15 Foucher, *Commentaires*, 24.
16 Duvergier, *Collection (1857)*, 336.

offences, it provided for additional and infamous penalties, such as cashiering, which were intended to aggravate the punishment. Finally, the Code did not admit extenuating circumstances (i.e. all facts or circumstances which could lessen the defendant's severity or culpability of a criminal offence). "In wartime, all circumstances are extenuating!"[17] said General Niel on behalf of the government during debates in the Parliament. This discrepancy between military and civilian justice was fully assumed by Langlais:

> The first condition of military justice is the need for speed; it is a question of punishing; but it is above all a question of intimidating, of preventing. The example must always be prompt, sometimes even instantaneous; and it is for this reason that this exceptional justice must not be embarrassed either in complicated rules that do not include the simplicity of the facts, nor the environment in which it acts, nor the character of its jurisdiction.[18]

Despite these exceptions in substantive law, the 1857 Code, for all its procedural innovations, was undoubtedly a modern code and can still be seen as the first (small) step towards the civilianisation of French military justice. The conclusion of Langlais' speech is revealing: "[the] legislator has founded exceptional law, as far as possible, on the basis and in the image of civilian law, because civilian law is a homeland from which one departs only with regret, and to which one returns with eagerness and happiness".[19] Langlais was personally convinced that the 1857 Code would set the law for decades to come and that the mistakes of the past would not be repeated: "[before] this Code, military laws were made of circumstantial and transitional legislation; they were born in the midst of our internal difficulties, under the fire of a war declared against France by the whole of Europe. They were only temporary and awaited the end of the war before being changed".[20] He could not foresee that political circumstances and wars would confront the 1857 Code and its drafters' confidence with numerous difficulties.

2 Times of War and Political Uprising (1870–1871)

The 1870–1871 Franco-Prussian War was a first test for the 1857 Code, as well as for the legislators who believed they had achieved the appropriate balance be-

17 Quoted in General Lamiraux, *Etude critique des projets de loi portant réforme du code de justice militaire pour l'armée de terre* (Paris: Lavauzelle, 1896), 51.

18 Quoted in Odile Roynette, "Les conseils de guerre en temps de paix entre réforme et suppression" *Vingtième-siècle 73* (2002), 53.

19 Duvergier, *Collection (1857)*, 443.

20 Duvergier, *Collection (1857)*, 339.

tween the requirement for discipline and the principles of justice. The conflict highlighted the challenge of enforcing rules of procedure common to peacetime and wartime, and a code that applied to both civilians and military personnel. Overall, it demonstrated the need for military justice to be perfectly adapted to wartime, particularly during times of defeat and debacle. In Alsace and Lorraine, the French Army suffered a series of defeats at Spicheren, Woerth, Nancy, Borny, Rezonville, and Saint-Privat, etc.[21] On 1 September, the emperor's army was surrounded at Sedan and, to stop the bloodshed, Napoleon III surrendered to the Prussians with 84,000 men. The Second Empire collapsed and was replaced by a transitional government, the Government of National Defence. Meanwhile, Léon Gambetta proclaimed the Republic, which was tasked with ending the war and organising elections.

Despite a fierce will to win and a fighting spirit recognised by historians, the indiscipline of French troops is often cited as one of the causes of the humiliating defeat in 1870.[22] Charles de Freycinet, Secretary of War in the Government of National Defence, noted in 1871: "We noticed, especially at the end of the war, the indiscipline that reigned among the troops: not that it manifested itself in an open rebellion, but rather in a nonchalance, a softness to carry out the orders received, a general letting go. This indiscipline has increased with our disasters".[23] A French officer who wished to remain anonymous also wrote in 1871:

> It would be unnecessary to extensively describe the distressing sight we witnessed throughout the campaign; anyone who participated saw it as we did. However, no description could convey to those who were not witnesses the appalling disorder of these columns, moving like herds along the roads, leaving long lines of stragglers behind them. It is difficult to imagine these hordes of pillagers descending like locusts upon the farms and villages they were about to ravage. Some soldiers discarded their cartridges to avoid carrying them and

21 See among others Nicolas Bourguignat and Gilles Vogt, *La guerre franco-allemande de 1870: U ne histoire globale* (Paris: Flammarion, 2020).

22 Joachim Ambert, *Histoire de la Guerre de 1870–1871* (Paris: Plon, 1873); Jean-François Lecaillon, *Les Français et la guerre de 1870* (Paris: L'Artilleur, 2020); Pierre Milza, *L'année terrible: La guerre franco-prussienne, septembre 1870 – mars 1871* (Paris: Perrin, 2009); François Roth, *La guerre de 70* (Paris: Fayard, 1990). See also General Lebrun, *Guerre de 1870, Bazeilles-Sedan* (Paris: Dentu, 1884); Gustave Frédéric Thomas, *La guerre de 1870: Metz* (Paris: Henri Oudin Editeur, 1871); Louis Vandevelde, *Commentaires sur la guerre de 1870–1871* (Paris: Henri Muzbach, 1872).

23 Charles de Freycinet, *La guerre en province pendant le siège de Paris* (Paris: Michel Lévy, 1871), 335.

> were determined not to engage in combat. Has an entire battalion ever been seen to disperse and flee at the first shots of a cannon?[24]

Some battalions were dissolved due to indiscipline, such as the *Tirailleurs de Belleville* Battalion on 6 December 1870.[25] In his *Memoirs* published after the war, General Charles-Gabriel-Félicité Martin des Pallières, who commanded the renowned 2nd Brigade of the "Blue Division", reported: "I must talk about the most serious difficulty I encountered upon arriving in Nevers: the incredible indiscipline among the troops. This problem was particularly prevalent among the troops I was attempting to organize, and it was imperative that we overcome it to have any hope of success".[26] In the same way, Lieutenant-Colonel Albert Senault wrote in 1878 in his *Notes on Military Justice*: "[after] a lost battle, the defeated army was taken up behind; many men remained hidden in the farms, in the villages around the battlefield, or they withdrew in a direction other than that followed by the army; some exchanged their uniforms for gowns and trousers under the pretext of escaping the enemy".[27] The French historian Arthur Chuquet wrote in 1893 in a chapter dedicated to the battle of Sedan: "[the] soldiers were undisciplined, running away like hares after fighting bravely like lions. They were lacking in resources and had to rely on charity, resorting to scavenging and pillaging".[28] Archives of the Government of National Defence are also full of telegraphic dispatches reporting indiscipline among French troops.[29]

Without neglecting the likely exaggerations from officers in the field, many testimonies suggest an interesting phenomenon: during the war, officers did not feel legally equipped to deal with acts of indiscipline. General de Pallières commented: "[numerous] examples have demonstrated the insufficiency of our military justice system, particularly during times of setbacks and retreats".[30] Lieutenant-Colonel Senault added: "[when] the higher authority wants to put an end to these disorders, it is stopped by the indulgence and slowness of the law".[31] In concrete terms, French officers criticised the procedure established by the 1857 Code,

24 Anonymous French officer, *La vérité sur les causes de nos désastres* (Paris: J. Dumaine, 1871), 30.

25 *Bulletin des lois de la République, XII ser., t. 1* (Paris: Imprimerie Nationale, 1871), 215.

26 Charles Gabriel Martin des Pallières, *Orléans: Campagne de 1870–1871* (Paris: Plon, 1872), 41.

27 Albert Senault, "Notes sur la justice militaire," *Bulletin des officiers de Terre et de Mer* 8 (1878): 634.

28 Arthur Chuquet, *La Guerre 1870–71* (Paris: Léon Chailley ed., 1893), 78.

29 Assemblée Nationale, *Actes du Gouvernement de la Défense Nationale* (Paris: Publications législatives, 1876).

30 Des Pallières, *Orléans*, 41.

31 Senault, *Notes*, 634.

because it was too long, because it needed too many officers (between nine and ten officers were 'mobilised' by the procedure from the preliminary investigation to the judgment by jury), because some of its provisions could not be applied in wartime – as, for example, Article 113 which required a copy of the Code of Military Justice be placed on the judge's desk.[32] As General des Pallières noted, "there were five or six pending cases, almost all of which carried the death penalty, but it was impossible to form a military court due to the shortage of officers who could properly perform the functions of rapporteur or government commissioners".[33] Moreover, officers criticised the shortcomings of the 1857 Code. "There are many crimes, very serious in their consequences, which can be committed in wartime, and which are not covered by the Code of Military Justice. They are punished at most by disciplinary sanctions, and we know that those sanctions are almost illusory" wrote Lieutenant-Colonel Senault.[34] The Code was thus accused of having set up a military system modelled on the civilian system, which was unsuited to the battlefield.

The balance between discipline and the rule of law, struck in 1857, would ultimately prove fatal to the Code. Indeed, on 2 October 1870, the Government of National Defence at Versailles issued a decree that ruled out many of its provisions: "[whereas] the dignity or strength of armies depends on the maintenance or restoration of discipline, the current legislation does not contain provisions for the immediate punishment of crimes and offences committed by military personnel in the field". Therefore, councils of war were replaced by courts martial "until the cessation of hostilities" (Art. 1).[35] Courts martial were summary military courts not provided for in the 1857 Code. These special courts were created temporarily during the French Revolution to make military justice faster and more efficient in wartime. Established by government decree in 1870, they were exceptional courts legitimised by the war, with special composition, deadlines and procedures designed to shorten trials. Furthermore, the decree abolished the few safeguards afforded by the 1857 Code. The government removed the final barriers preventing military justice from being expeditious and exemplary: investigation was abolished, pleadings by lawyers were prohibited, and the number of judges was reduced from seven to five – to expedite voting and minimise debates. The jurisdic-

32 For a complete analysis of the procedure, see Gwenaël Guyon, "French Military Justice from One War to Another: Reforms and Controversies (1870–1928)," *Revue Internationale de Droit Pénal* 93 (2022): 65–87.

33 Des Pallières, *Orléans*, 41.

34 Senault, *Notes*, 634.

35 "From the day of promulgation of this decree, courts martial shall be established, to replace the councils of war, until the cessation of hostilities."

tion of the courts martial was extended to all criminal acts or acts considered to be criminal: murder, espionage, rape, pillage and, revealingly, insults to superiors. In the event of a death sentence, execution was immediate. The decree also promoted summary executions: "[on] the battlefield, any officer and non-commissioned officer is authorised to kill the man who gives proof of cowardice, by not going to the post indicated to him, or by throwing disorder by desertion, panic or other acts likely to jeopardize the operations" (Art. 6). Finally, the right to appeal was abolished (Art. 2: "[there] shall be no review of decisions brought by courts martial"). The decree thus established a summary form of justice, designed to efficiently suppress certain failings without delay, sacrificing the rule of law and basic legal rights at the altar of discipline and operational requirements. Military justice was used by the government to compel soldiers to fight for the liberation of their invaded homeland and for the sake of public safety. In other words, the phraseology and concepts of the French Revolution were employed to legitimate and justify what suddenly became brutal, harsh, and was normally illegal under the 1857 Code.

The military defeat at Sedan also resulted in one of the most significant popular uprisings of the nineteenth century and a troubling episode in the history of military justice in France: the Paris Commune (*Commune de Paris*, March to May 1871). Following the proclamation of the Republic in September 1870, two opposing camps emerged. The transitional government appeared hesitant to continue the war, while the people of Paris, who were under siege from the Germans and were defended by the *Garde Nationale*, were eager to unleash it. In January 1871, Paris learned of the proclamation of the German Empire at Versailles amidst a state of siege, bombardment, and starvation. The monarchists then won the hastily organised elections in February 1871, following the signing of the armistice. Paris felt betrayed. Adolphe Thiers, the chief executive of the new government established in Versailles, aimed to swiftly re-establish order and national authority in Paris and requested the National Guard to return its cannons. On 18 March, the army went to retrieve the cannons from Belleville and Montmartre, resulting in a popular revolution. The people of Paris opposed this action, the mob executed two generals and fraternised with a part of the army. The National Guard and republican committees seized power in Paris and organised their own government, the "Commune Council", a social and popular republic.[36] From 21 to 28 May 1871, during the "bloody week", the government troops progressively regained control of Paris and took revenge. Thousands of Communards – between 6,000 and 17,000, the total number being debated – were shot in various districts

36 See Robert Tombs, *The Paris Commune 1871* (London and New York: Longman, 1999).

of the capital, with a *laissez-faire* from the government in Versailles. Summary military courts ("provost courts") were set up at the École Polytechnique, the Gare du Nord, the Gare de l'Est, Châtelet and Luxembourg. Those "courts" were not provided for by the 1857 Code.

However, as soon as it regained control of the capital, the government desired a return to the rule of law, i.e. the 1857 Code. Yet, in the past, political insurrections had usually been suppressed by special courts. For instance, following the 1848 uprisings in Paris, the decree of 9 July 1848 had established special military commissions.[37] On the contrary, in 1871, the government decided to respect the legal process instead of relying on special courts. On 22 May, Adolphe Thiers delivered a resolute speech to the National Assembly and pledged "complete atonement" from the "communards", but in compliance with the law:

> Gentlemen, we are honest people: justice will be done through the proper channels. The laws alone will intervene, but they will be enforced to the full extent [. . .]. Gentlemen, atonement will be complete, but it will be, I repeat, atonement such as honest people must inflict when justice demands it, atonement in the name of the laws and by the laws.[38]

The State on Siege Act of 1849 had been applied in Paris in August 1870 and extended to the department of Seine-et-Oise (west of Paris) in 1871. Its Article 7 stipulated that "the powers vested in the civil authorities to maintain law and order and the police [were] transferred in their entirety to the military authorities". Its Article 9 authorised the military "to search people's homes, day and night" and to arrest suspects. In total, about 38,000 "communards" were arrested.[39]

The 1857 Code, which was specifically designed to address internal threats, appeared to be an instrument of judicial repression. Between 1871 and 1879, twenty-six councils of war were convened. General Félix Antoine Appert, commanding the territorial division of Seine-et-Oise oversaw military justice operations. In a report, released in 1875, he stated that given the number of accused, and staffing requirements, the Parliament urgently adapted the 1857 Code (Art. 6, 7, 19, 43, and 44) on 7 August 1871.[40] The drafters of the statute stated before the

37 Fabien Cardoni, "Contribution à l'étude de la répression judiciaire de juin 1848," *Histoire, économie et société* 2 (2009): 75–85.

38 Quoted in General Appert, *Rapport d'ensemble sur les opérations de justice militaire relatives à l'insurrection de 1871* (Versailles: Cerf et fils, 1875), 178–179.

39 Jean-Claude Farcy, "La répression judiciaire de la Commune de Paris", accessed 12 June 2025, https://communards-1871.fr/index.php?page=presentation/historique. See also Jean-Claude Farcy, "La répression de la Commune," in *De la dictature à l'état d'exception,* ed. Marie Goupy and Yann Riviere (Rome: Publications de L'École française de Rome 2022), accessed 12 June 2025, https://books.openedition.org/efr/49684#ftn2.

40 Appert, *Report*, 204.

National Assembly: "[as] the war councils begin their work, necessary measures should be taken to facilitate their task, ensure their operation and regulate their numbers".[41] Amendments were numerous and significant: the functions of president and judges of councils of war, previously limited to officers belonging to the Paris territorial military division were extended to all officers from other territorial divisions, presidents and judges sitting in courts of appeal might also be appointed from outside the Paris division, the number of prosecutors and investigating judges was extended to one hundred (130 would finally be appointed by October 1871), the number of councils of war was increased to fifteen (instead of four), and could be increased to a higher number if needed.[42] In the same way, the general commanding the division, who was the only one authorised by the 1857 Code to give the order to inform, to prosecute and to convene councils of war, could delegate these powers to subordinate general officers (to relieve him). Finally, councils of war could continue to sit after the state of siege had been lifted and until the facts had been fully examined. To reduce costs and delays, a proposal was even made to Parliament to allow councils of war to sit in prisons, but the Parliament refused to go along with this as it would not have respected basic principles of civilian justice.[43]

The 1st and 2nd Councils of War at Versailles oversaw the investigation and trial of military cases, especially those involving deserters and seditious soldiers, while other councils of war were responsible for investigating and, if necessary, judging nearly 30,000 people.[44] Due to the volume of cases, civilian courts and personnel were also involved in this military repression. Ordinary crimes, such as looting, murder and arson, were investigated by civilian investigating magistrates and civilian courts judged the offence of usurpation of public functions. In total, some 450 people were convicted by civilian criminal courts for having unlawfully usurped the functions of police inspectors, prison guards, judges, or bailiffs during the Commune. In the same way, from August 1871, civilian magistrates assisted the councils of war in judging the leaders of the Commune – to secure the condemnation.[45] From 1871 to 1879, out of almost 40,000 decisions brought by military courts, there were 20,000 dismissals, 10,000 convictions (the vast majority of which involved deportation and imprisonment), 3,000 convictions in absen-

41 Recueil Duvergier, *Collection complète des lois, décrets, ordonnances, règlements et avis du Conseil d'Etat*, vol. 71 (Paris: Charles Noblet, 1871), 150.

42 The two permanent councils of war of Paris which sat in Versailles and two supplementary councils established on 22 January 1871. See Appert, *Report*, 204, 209.

43 Appert, *Report*, 204.

44 Appert, *Report*, 205.

45 Farcy, *La répression judiciaire*, 5.

tia and 2,500 acquittals.[46] In other words, as in 1870, military justice was adapted to the circumstances and was used as a remedy to political sedition in peacetime.

3 A Time of Reforms (1875–1914)

After traumatic political events and a humiliating defeat, Parliament undertook to reform the entire French Army. Two important pieces of legislation – among others – were passed, one in 1872 on conscription and mandatory national service, and the other in 1873 on the redistribution of military territories.[47] Military justice in wartime was also at stake. On 12 March 1874, General du Barail, the Minister of War, introduced a bill before the National Assembly.[48] Its aim was to bring military justice into line with the recent legislation promulgated and to take account of past failures to reform the 1857 Code. Debates started at the National Assembly on 3 March 1875. On behalf of the government, General Pierre Robert, who had been captured at Sedan in 1870 before being elected to parliament in 1872, reported on the bill. The lessons of the last war and the balance between the demands of justice and those of war were at the heart of the debates. And on this point, there is no question of changing the spirit of the 1857 Code, according to General Robert: "[we] are not undertaking a complete revision of our code, we are just retouching a number of its articles".[49] For him, the balance struck in 1857 between discipline and rule of law had to be maintained. All that was needed was to give military justice the speed it had lacked in 1870:

> During the last war, the procedural formalities required by the Cexpeditiouode led to delays which held up the trial of cases at a time when it was in the greatest interest, from a disciplinary point of view, that crimes and offences should be punished as quickly as possible. It is essential to consider how to accelerate the judicial process in times of war. We have not increased the penalties; we have proposed measures to make repression quicker, safer, more effective and easier to apply.[50]

During debates, General Charles Loysel, also captured in 1870 before being elected in 1871 as representative from Ille-et-Vilaine, proposed his own counter-

46 Farcy, *La répression judiciaire*, 8.

47 The law of 27 July 1872 made military service compulsory for all French citizens over the age of nineteen. At the time, the army could only take in 400,000 men, so the length of active service was decided by lottery: either one year or five. The law would be reinforced on 15 July 1889.

48 *Journal Officiel de la République française* (13 March 1874), 1938.

49 *Journal Officiel de la République française* (19 May 1875), 3515.

50 *Journal Officiel de la République française* (19 May 1875), 3516.

project. His aims were to increase penalties and make military justice even more expeditious. He was an ardent promoter of the derogatory nature of military justice, and he called for the drafting of a special code for wartime that would provide for courts martial. According to him, the term "court-martial" was likely to leave its mark on soldier's consciences. Because they carried the memory of the repression of 1870; because they symbolised exceptional justice in exceptional times; because they were frightening and fear alone was likely to destroy indiscipline: "I am convinced that when it comes to military justice, a word can exert the most effective influence. Here, the moral effect must be decisive".[51] General Loysel was confident courts martial – i.e. summary military courts acting with severity – were the best means to impose discipline within the troops in times of war, especially within troops of conscripts: "[e]xceptional jurisdiction was already a necessity when war was fought with small armies, made up of soldiers trained to discipline by long service in the army; now strategy moves huge masses, over vast territories, with hitherto unknown means of locomotion".[52] In 1872, Léon Gambetta wanted an army of "citizen-soldiers", into which conscription would throw hundreds of thousands of men, torn from their daily occupations to be subjected to the harsh demands of military life and the intransigent military discipline. He had got it, affirmed General Loysel, but from then on, the 1857 Code had to be adapted to this new reality: "The workforce is growing at an unprecedented rate. It is therefore imperative that we use all available means to strengthen discipline and take faster and more rigorous legal action, using exceptional means".[53] He culminated his demonstration by insisting on the inevitability of courts martial in wartime:

> In all serious circumstances, courts martial have always been the preferred option. The recent experience of 1870 still confirms this. It has always been necessary; it will always be necessary to have recourse to these means. But it should not be used when the evil has already taken such deep roots that the remedy would no longer be effective. If the court martial is not incorporated into the law in advance, it will be impossible to create it in due course. Humanity, the need to ensure success, imperiously command you the creation of courts martial.[54]

However, he called on Parliament to work on courts martial immediately: "[it] is in calm and peace that we must prepare such a jurisdiction and not improvise it in time of war by means of decrees". In other words, when the war of revenge

51 *Journal Officiel de la République française* (4 March 1875), 1629.
52 *Journal Officiel de la République française* (4 March 1875), 1629.
53 *Journal Officiel de la République française* (4 March 1875), 1629.
54 *Journal Officiel de la République française* (4 March 1875), 1629.

would come, the improvisation of courts martial in 1870 was a model to be avoided. Finally, General Loysel did not hide his will to make military justice more severe when he proposed the abolition of the right of appeal and the generalisation of death penalty to the whole range of serious military offences in wartime.

General Robert rejected the idea of a separate legislation for wartime: "[we] do not want to have a new act forming a special and separate text, superimposing itself on our military code and undermining many of its articles".[55] He also rejected courts martial and denounced General Loysel's desire to increase the number of capital offences. The proportionality between crime and punishment had to be maintained: "[the] code has established for each crime and misdemeanour a scale of penalties sufficiently broad to allow the punishment to be graduated according to the seriousness of the offence and its circumstances."[56] Furthermore, regarding the right of appeal, General Robert said: "General Loysel's counter-project intends to prohibit the right of appeal always and absolutely, while we accept this measure only exceptionally and under certain special conditions".[57] Finally, he accused General Loysel's counter-project of being "modelled on the decree of 2 October 1870". In the end, the Parliament adopted General Robert's moderate bill and amended rules for wartime by the *Loi portant modification du code de justice militaire*. Paul Pradier-Fodéré, Professor of Public Law at the *College Arménien de Paris*, commented on the issues at stake in the 1875 reform:

> The legislator had to consider two distinct aspects: he had to reconcile the needs of military justice with the guarantees that the accused, whatever his crime, is always entitled to demand. He also had to think that on the battlefield, the law of military justice is a law of common salvation. In times of war, it must be concerned above all with external circumstances, the effect produced, the influence that an appearance of impunity could exert, not only on the soldiers, but also on the inhabitants.[58]

In total, twenty-five articles were amended in 1875. The composition of the councils of war in wartime was significantly changed. The number of judges was reduced from seven to five to facilitate the formation and convening of military tribunals even during the most active military operations. A single officer would be responsible for the functions of prosecutor and investigating judge, to avoid mobilising too many officers who were indispensable on the battlefield. The accused could be summoned directly to a council of war without prior notice. Conviction

55 *Journal Officiel de la République française* (4 March 1875), 1629.
56 *Journal Officiel de la République française* (4 March 1875), 1630.
57 *Journal Officiel de la République française* (4 March 1875), 1630.
58 Pradier-Fodéré, *Commentaire,* 855.

in wartime was decided by a simple majority (three votes to two), whereas in peacetime it was decided by five votes out of seven. Finally, the right to appeal could be temporarily suspended by decree of the President of the Republic or by order of the commander of a besieged place.

Some observers welcomed the reform with great relief, like Pradier-Fodéré, who wrote:

> All the conditions for good legislation are now met in the 1857 code. The councils of war are organised in such a way as to guarantee the repression of acts contrary to discipline, to strengthen the independence of the judge and the rights of the accused. The voice of humanity has been listened in the graduation of sentences: the legislator has softened them whenever the interests of justice and command did not stand in the way. The separation of civil and military jurisdictions has been maintained, with the aim of protecting the army against those criminal attempts which, in times of trouble, seek to alter its spirit and to distance it from its duties.[59]

Captain R. (who wished to remain anonymous) also wrote with satisfaction in 1899: "[d]espite criticism, it can be said that the 1857 Code still contains all the necessary elements for good and wise justice".[60] The Journal of French Officers was also pleased: "[the] new reforms considerably simplify the military procedure without going as far as the Government of National Defence did in the past".[61]

On the contrary, other observers expressed their fears, such as General Lamiraux, commanding the French Ecole de Guerre. To his eyes, the amended code was not adapted to wartime. He wrote in 1896 in his Critical Study of Bills on Military Justice Reforms: "It is necessary, as a preparation to war, to have a special legislation promulgated and known in peacetime. If it is not done, it will have to be done at the time of the war. It is better to do it immediately! We do not wait for the day of mobilisation to put surgical instruments in the ambulance canteens".[62] Similarly, André Taillefer, a lawyer at the Paris Court of Appeal and a former officer, stated in 1895 that "the code of military justice of 1857, even if modified by the law of 1875, is not a code of war".[63] His aim was "to demonstrate the weaknesses of the present code of military justice in wartime". For him, the procedure was still too long: "with the modified code, even under the most favourable conditions, repression

59 Pradier-Fodéré, *Commentaire,* xxvii.

60 Capitaine R., *La réforme du code de justice militaire* (Paris: Chapelot et Cie, 1899), 3.

61 Anonymous, "Réforme de la justice militaire," *Bulletin de la réunion des officiers de terre et de mer* 5 (1875), 832.

62 General Lamiraux, *Etude critique des projets de loi portant réforme du code de justice militaire pour l'armée de terre* (Paris: Lavauzelle, 1896) 48.

63 André Taillefer, *La justice militaire dans l'Armée de Terre* (Paris: Larose, 1895), 409.

lacks one of its essential qualities: promptness".[64] Taillefer stated: "[then], a new danger is to be feared, that the councils of war may not be able to do their job; this happened in 1870. From the beginning of the campaign, acts of indiscipline multiplied and it was necessary, too late, to resort to courts martial".[65] As General Loysel in 1875, he warned the legislator, in no uncertain terms, that: "[an] exceptional jurisdiction must not be improvised".[66] Instead, he proposed:

> a special code for wartime discussed in all its parts in peacetime, known by soldiers as well as officers, the former knowing in advance what awaits them if they fail in their duty; the latter, penetrated by the greatness of their mission, sustained by the idea of salvation of the fatherland, will know how to carry out their dreaded duty without weakness.[67]

In the 1890s and 1900s, military justice in peacetime would also undergo some innovations. Its functioning, its basic principles and even sometimes its very existence, were challenged due to the Dreyfus affair and the "Biribis" scandal in North Africa. In 1894, in the context of German annexation of Alsace and Moselle, Captain Alfred Dreyfus was convicted of treason for allegedly selling military secrets to the Germans. "The Affair" (1894–1906), which reflected antisemitism and a strong sense of nationalism, divided French public opinion, as Dreyfus' guilt or innocence emerged as the lodestar of political belief for most social and political groups. The pro-Dreyfus side (including Georges Clemenceau and Emile Zola) accused the army of covering up Dreyfus' false conviction and the military justice system of being corrupt.[68] In 1898, following the publication of a letter by Zola entitled "*J'accuse*", Freycinet, the Minister of War, set up a commission to consider reforming military justice in peacetime. In 1906, Alfred Dreyfus was exonerated, restored to duty, and promoted. But through its impact and the light it shed on rules of military law and procedure, the Dreyfus affair had opened a two-decade debate on the reform of the French military justice in peacetime. In the same way, in 1889, George Darien published *Biribi*, a novel that denounced the sadism of non-commissioned officers who bullied and abused the most hardened rebel soldiers in North African disciplinary units.[69] Though disciplinary units had existed as early as 1818 (which established the "companies of pioneers and riflemen" or *compagnies de pionniers et de fusilliers*). Sent to those units were "soldiers who, without having committed any of-

64 Taillefer, *La justice militaire,* 401.
65 Taillefer, *La justice militaire,* 410.
66 Taillefer, *La justice militaire,* 410.
67 Taillefer, *La justice militaire,* 410.
68 See (among others) Jean-Denis Bredin, *The Affair* (New York: New York University Library, 1986) or Bertrand Joly, *Histoire politique de l'affaire Dreyfus* (Paris: Fayard, 2014).
69 Georges Darien, *Biribi* (Paris: Savine, 1890).

fence which would render them liable to the councils of war, persist in misdemeanours and petty offences which can no longer be punished by the penalties of simple discipline".[70] The aim was "to separate the wheat from the chaff", in other words, to remove and isolate the bad elements to safeguard the healthy part of the army. Following the conquest of Algeria in 1830, the Ministry of War created the *Bat' d'Af* (acronym of *Bataillons légers d'Afrique* or Battalions of Light Infantry of Africa), which were units serving in Africa, made up of soldiers with prior prison records or military personnel condemned by councils of war. In 1836, a law made it compulsory for all soldiers sentenced to between three months and five years' imprisonment who still had a few years' left of military service to be sent there.[71] *Bat' d'Af* were places where the French Republic got rid of its worst elements and were seen as a way of strengthening discipline and rehabilitating souls. They were units of decontamination and correction. Therefore, living conditions in these disciplinary battalions were harsh: no leave, no communication with the outside world, and reduced pay.[72] Nonetheless, incorrigible and inveterate soldiers from *Bat' d'Af*' who still refused military discipline could be sent to more terrifying places: the "Biribis", a generic term and a popular shorthand for military penitentiaries, itinerant camps, or disciplinary prisons located in North Africa and known for forced labour, back-breaking work, physical abuses, institutionalised violence, and arbitrary punishments. In 1890, Georges Darien's autobiographical novel shed light on those punitive structures, provoking indignation and reinforcing anti-militarist sentiment. In 1909, three years after Dreyfus' rehabilitation, the death of the soldier Albert Aernoult in a Biribi became a national scandal (the "popular Dreyfus affair"). Popular mobilisation culminated in the repatriation of the soldier's body to Paris in February 1912, attended by almost 150,000 people.[73]

Between 1898 and 1909, under pressure from public opinion, from the political class, or from learned societies (as the *Société Générale des prisons*, the *Société de Législation comparée* or the *Ligue des Droits de l'Homme*), twenty-one bills on reform of military justice in peacetime were introduced at the French Parliament to re-equilibrating the balance between discipline and rule of law.[74] Georges

70 Michel Pierre, *Histoire des bagnes* (Paris: Tallandier, 2013), 273.

71 Pierre, *Histoire des bagnes,* 276.

72 Dominique Kalifa, *Biribi*, (Paris: Tempus, 2009), 95. See also Albert Londres, *Dante n'avait rien vu* (Paris: Albin Michel, 1924).

73 John Cerullo, "The Aernoult-Rousset Affair: Military justice on trial in Belle Epoque France," *Historical Reflections* 34 (2008), 5.

74 Odile Roynette, "Les conseils de guerre en temps de paix entre réforme et suppression (1898–1928)" *Vingtième Siècle. Revue d'histoire* 73 (2002): 51–66. The full list of bills is provided by Humbert Ricolfi, *Le code de justice militaire du 9 mars 1928* (Paris: Lavauzelle, 1932), 15–18.

Lhermitte wrote in 1904 in a pamphlet calling for the abolition of military justice in peacetime: "Since the Dreyfus affair, all the ministers have taken it in turns to draw up major bills to give the public something to believe in".[75] Arsène Ladevie commented on the long-lasting campaign for reform: "The study of judicial reform was approached in Parliament in perfect calm. In short, almost all our representatives were convinced of the need to rejuvenate our outmoded military jurisdiction".[76] It is true that, after the Dreyfus affair, there was unanimous criticism of the discrepancy between the practices of a modernised civil justice system that sought to humanise sentences and procedures, and an unchanged repressive military justice system. Between 1898 and 1909, revealingly, the literature on military justice had never been so extensive.[77] The first criticism levelled against military justice was that it was a special and derogatory form of justice. Anatole France claimed in 1899: "[s]ince the army is an administration like agriculture, finance or public education, it is inconceivable that there should be military justice, when there is no agricultural justice, financial justice or university justice".[78] Other criticisms included the incompetence and the lack of independence of the military personnel of military justice, the anachronistic procedure, the severity of the sentences, the closed sessions and the unequal treatment of officers and soldiers.[79] Moderate reformers were calling for limited reforms: ju-

75 Georges Lhermitte, *A bas la justice militaire!* (Paris: Libraire La Raison, 1904), 1.

76 Arsène Ladevie, *Réforme des tribunaux militaires de l'armée de terre en temps de paix* (Lyon: Université de Lyon, 1910), 10.

77 Paul Chassaing-Belmin, *Délits militaires et délits de droit commun commis à l'armée en temps de paix* (Paris: Université de Paris, 1910); Paul Dislère, *Législation de l'armée française et jurisprudence militaire* (Paris: Paul Dupont édn., 1894); Dominique Dulme, *Etude sur l'organisation et la compétence de la justice militaire de l'armée de terre* (Toulouse: Saint-Cyprien, 1895); Emile Ferris, *Responsabilité et justice militaire* (Bordeaux: Cassignol, 1896); Victor Jannesson, *Réforme des conseils de guerre et révision de la jurisprudence militaire* (Paris: Savine, 1899); Arsène Ladevie, *Réforme des tribunaux militaires de l'armée de terre en temps de paix* (Lyon: Université de Lyon, 1910); Francis Laloe, *Observations sur la compétence des conseils de guerre de l'armée de terre* (Paris: Rousseau, 1894); Général Lamiraux, *Etude critique des projets de lois portant réforme du code de justice militaire*, (Paris: Lavauzelle, 1902); Georges Lhermitte, *A bas la justice militaire!* (Paris: Libraire La Raison, 1904); Paul Maire, *Discipline, criminalité et justice militaires* (Paris: Lavauzelle, 1909); Etienne Meynieux, *De la réforme du code de justice militaire* (Montpellier: Martel, 1898); Victor Nicolas, *Commentaire complet du code de justice militaire* (Paris: Maresq et Cie, 1898); Capitaine R., *La réforme du code de justice militaire* (Paris: Chapelot et Cie, 1899).

78 Anatole France, *Œuvres complètes illustrées* (Paris: Calmann-Lévy, 1927) 94.

79 On the issue of incompetence and lack of independence, Captain Victor Jannesson wrote in 1899: "A few years ago, by order, I performed the duties of prosecutor in a military court, and I can affirm on my honour that I have never had my soul more tortured than at that time in my life, as a result of my lack of experience and my complete ignorance of the principles of law, which I had never studied." Victor Jannesson, *Réforme des conseils de guerre et révision de la*

risdiction of civil courts in peacetime to deal with civilian offences, referral to the *Cour de cassation* (i.e. the civilian Supreme Court) of appeals against judgements made by councils of war in peacetime, ability to grant mitigating circumstances in peacetime, recruitment of military magistrates based on legal training, and judges vote by secret ballot.[80]

The most radical reformers went further, by calling for the pure and simple abolition of military justice in peacetime. Jules Dietz commented in 1899: "[for] some, reform is not a problem, and the solution is simple. Peacetime councils of war and councils of revision should simply be abolished".[81] For instance, Georges Lhermitte wrote in 1904: "[our] warriors no longer have the right to invoke military discipline to defend their monstrous privilege: the right to judge. To ensure the supremacy of civilian power, it is essential to abolish the institution of military justice".[82] The socialist Edouard Vaillant, for whom "military justice is an instrument of tyranny against soldiers", introduced bills to abolish military justice in peacetime in 1898, 1903 and 1908, while other bills were read and debated in 1902, 1906 and 1907.[83] Finally, reformers would prove unable to achieve their ultimate goal of eliminating peacetime military justice. Nevertheless, considerable progress was made in aligning the practices of military courts with those of civilian courts: in 1899, the defendants of the accused were guaranteed access to almost all the information gathered from the beginning of the preliminary investigation. In 1901, the Parliament approved the deduction of pre-trial detention from the length of the prison sentence, while mitigating circumstances were granted in peacetime. In 1904, an act extended to military personnel the stay to execution.[84] Arsène Ladevie summed up the results of the reform movement between 1898 and 1909: "[get] as close as possible to ordinary law and only deviate from it when it is necessary to safeguard disciplinary action".[85]

jurisprudence militaire (Paris: Savine, 1899), 1. On procedure, severity of sentences and unequal treatment, see Roynette, *Les conseils de guerre*, 53–61.

80 Jules Dietz, "La réforme des conseils de guerre," *Revue de Paris* 6 (1899), 505–508.

81 Dietz, "La réforme des conseils de guerre," 504.

82 Lhermitte, *A bas la justice militaire!* 2.

83 Quoted in Boris Battais, "*La justice militaire en temps de paix: l'activité judiciaire du conseil de guerre de Tours*" (PhD diss., Université d'Angers, 2015), 58.

84 Ricolfi, *Le code*, 18.

85 Ladevie, *Réforme des tribunaux militaires*, 11.

4 The 1928 Code: Learning from the Past

Military justice in peacetime was thus transformed while nothing had been changed for wartime since 1875. As if history were repeating itself, the First World War was a terrible test for the French Code of Military Justice. On 2 August 1914, France was declared to be in state of siege and the old law of 9 August 1849 was applied. On 10 August 1914, General Joffre was given "full power to issue the instructions necessary to ensure the administration of justice".[86] The 1857 Code remained in force during the "Battle of the Frontiers" (August 1914), despite some modifications quickly made by the government on 10 August, regarding desertion, treason, and spying: "[the] right to appeal for review of a judgement by a council of war in application of articles 204–208 is suspended".[87] Nonetheless, following the defeat at Mons (23 August), the "Great Retreat" provoked a sudden drop in morale and discipline. And the political response was immediate. In the context of defeat, war and fear seriously weakened the rule of law and gave way to exceptional measures. Once again, military justice was adapted by circumstantial laws; once again, military justice became an instrument used to restore order and discipline, for the salvation of the homeland. On 24 August, Adolphe Messimy, Minister of War, sent a telegram to Joffre:

> There is no punishment for failure other than immediate death; the first to suffer must be the guilty officers. The only law in France now is win or die. My telegrams come from the same thought, from the same doctrine, that of the Committee of Public Safety. As in 1793, perhaps even more so, the country is in danger. Only men of such fierce energy can give us victory. I remember that the Revolution was not kind to cowardly, weak, or incompetent generals.[88]

On 30 August 1914, Joffre stated in a note sent to the government: "[the] information I have received shows that the repression of crimes and offences committed in the armed forces is not being pursued with the necessary vigour".[89] On 6 September, special courts martial (*conseils de guerre spéciaux*) were established – they were composed of three officers. The procedure was oversimplified: legal

86 Quoted in André Bach, *Fusillés pour l'exemple 1914–1915* (Paris: Tallandier, 2003), 151.

87 See Dalloz, *Guerre de 1914: documents officiels, textes législatifs et réglementaires* (Paris: Dalloz, vol. 1, 1915), 63.

88 Quoted in Jean Bastier, "Les fusillés pour l'exemple (1914–1918) et la campagne des procès en révision (1921–1934)", in *Justice et politique: de la guerre de cent ans aux fusillés de 1914,* ed. Jean Bastier (Presses de l'Université de Toulouse, 1998), 218.

89 Quoted in Vincent Suard, "La justice militaire française et la peine de mort au début de la Première Guerre mondiale", *Revue d'histoire moderne et contemporaine* 41.1 (1994): 142.

deadlines and preliminary investigations were abolished while the punishment was decided by two votes out of three. To restore and maintain discipline, and to punish serious offences (desertion, absence without leave, abandonment of position, mutilation, assaulting a superior officer or refusal to obey) or those alleged to be such, the military command could therefore use a summary system of military justice. Despite some proof of clemency and leniency from many councils of war which refused to apply those measures, those wartime legislations opened the way too many errors, excesses, and regrettable injustices, with a *laissez-faire* attitude – and sometimes encouragements – from the government.[90] In total, 826 convicts were shot after judgment by a military court. Around thirty of them were shot for the sake of example, most of them during the terrible years 1914–1915. However, as the war of movements came to an end, from April 1915 onwards, and behind the lines, many members of Parliament called for military justice to be brought back into the orbit of the rule of law. At a time when the soldiers were digging their trenches and Paris was no longer under threat, Parliament was determined to regain control over the decisions of the military command and the government. Indeed, the report of several abuses by some councils of war led members of Parliament, like Paul Meunier, to propose bills on the reform of military justice. Following a long-lasting campaign, and under the pressure of the public opinion, on 27 April 1916, by a legislation which was unprecedented in the history of French military justice, the legislator returned to the guarantees of the 1857 Code. It restored the stay of execution, the preliminary investigations, the right to counsel and the right to appeal and it abolished courts martial. More importantly, it allowed extenuating circumstances in wartime. In other words, and paradoxically, the First World War enabled military justice to make some progress towards civilianisation. But the war had, for a short period, sacrificed the rule of law.

In 1921, Louis Barthou, the Minister of War, appointed a commission to reform military justice both in peacetime and in wartime. He wrote: "[the] war has been a great lesson. We have paid dearly for its painful experience. It is necessary to reconcile discipline and justice, which are inseparable from each other, but

90 André Bach, *Fusillés pour l'exemple 1914–1915* (Paris: Tallandier, 2003), Jean Dintilhac, *Essai sur le fonctionnement de la justice militaire en période de guerre civile ou étrangère. Jugements rendus pendant la guerre de 1914–1918, leur révision par la Cour de cassation* (Paris: PUF, 1929); Jean-Claude Farcy, "Droit et justice pendant la Première guerre mondiale. L'exemple de la France," *Ler Historia* 66 (2014): 123–139; Jean-Yves le Naour, *Fusillés, enquête sur les crimes de la justice militaire* (Paris: Larousse, 2010); Guy Pedroncini, "Les cours martiales pendant la Grande Guerre," *Revue Historique* 252 (1974): 393–408.

which absolute theories risked, in different ways, sacrificing one to the other".[91] Following long and intricate debates, the Parliament adopted a new Code of Military Justice (hereafter 1928 Code) on 9 March 1928 and enshrined most of the reforms that had been suggested before the war. Indeed, it abolished the councils of war and replaced them with military tribunals – a reassuring semantic reform. More importantly, the law provided that in peacetime, these courts were presided over by civilian magistrates. In the same way, in peacetime, military courts were only competent for military offences. In wartime, on the contrary, the 1928 Code provided that military courts would be presided by an officer and might try all offences. Nevertheless, the greatest innovation of the 1928 Code was the establishment of a body of professional military judges (the Corps of Military Justice), trained in law, who would serve in military tribunals both in peacetime and wartime.

Conclusion

The 1928 Code marked an important stage in the long movement towards the civilianisation of French military justice, which would continue to move towards civilian justice throughout the twentieth century. The Code was characterised by a will to respect special military duties and military discipline by maintaining military courts and authorising specific criminal procedures, while at the same time enshrining, even modestly, a certain concern for civilian principles of justice. However, as soon as the Second World War started, the code was quickly amended by the Presidential decree of 3 November 1939, to reform the composition of courts and limit recourse to the Court of cassation in wartime (Art. 5).[92] Military justice would then endure many changes between 1939 and 1945. Regarding civilianisation, the reform of 8 July 1965, which established a new Code of Military Justice, brought military justice closer to the civilian justice system by introducing a mixed composition within the military courts. In peacetime, civilian magistrates were seconded by the Ministry of Justice to the Ministry of Defence to perform the duties of military judges in permanent military courts (Art. 7). In wartime, permanent territorial military tribunals (*Tribunaux territoriaux des forces armées*) were composed of two civilian magistrates and three military judges (Art. 28), while Field military courts (*Tribunaux militaires aux armées*)

91 Ricolfi, *Le code*, 4.

92 *Journal Officiel de la république Française* (Paris: 8 November 1939), 12942.

were headed by a military judge and composed of three professional military judges, who were all members of the Corps of Military Justice (Art. 53).

However, the major reform occurred in 1982. The Act of 21 July 1982 abolished Permanent military tribunals for peacetime and transferred their competency to specialised chambers within territorial civilian courts (*Tribunaux de grande instance*). Those specialised chambers composed of civilian personnel were responsible for investigating and trying offences committed by military personnel on the national territory (Art. 1). In the same way, the Code gave to the civilian prosecutor the power to initiate public proceedings – after having informed the Minister of Defence and obtaining its opinion – whereas this prerogative previously belonged to the Ministry of Defence. Regarding offences committed abroad in peacetime, the Code established a special military court, the *Army Forces Tribunal* in Paris. However, this Code maintained military tribunals in wartime. Military courts in peacetime survived until the final abolition of the military court in Paris in 2011. By abolishing the distinctive aspects of the military justice system in peacetime, the law of 13 December 2011 gave birth to the French hybrid model of military tribunals, which today provides for civilian courts in peacetime and military courts in wartime. In conclusion, in 2011 the long movement for the civilianisation of French military justice system in peacetime, initiated by the 1857 and 1928 Codes, was achieved.