

RESEARCH ARTICLE	The Discretionary Power of the Criminal Judge in Conviction Based on Evidence	
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Abstract The Algerian legislator has granted the criminal trial judge broad discretionary power in being convinced by the evidence upon which the judgment is based, whether that evidence serves to establish the charge and attribute it to the accused, thereby leading to a conviction, or whether it serves to negate the charge, resulting in an acquittal. The legislator has set specific conditions regarding the evidence upon which the criminal trial judge forms his conviction, notably by requiring that the evidence be lawful and discussed in an adversarial manner during court proceedings by both parties. Furthermore, the legislator has established guidelines governing the judge's freedom in assessing evidence according to his discretionary authority. As a general principle, the judge is granted complete freedom to be convinced by the evidence, with the sole obligation of providing reasoning for the judgment. However, by exception, the legislator has imposed certain restrictions on this discretionary power in the judge's conviction based on evidence.		
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I. Introduction

The issuance of criminal judgments is generally based on the principle of the judge's freedom to adopt any piece of evidence that has been examined during the trial proceedings by the provisions of paragraph two of Article 212 of the Code of Criminal Procedure. The discretionary power of the criminal trial judge refers to the judge's authority to weigh and evaluate the facts of the public case and the admissible evidence obtained and discussed during the hearings. This power is exercised to reach a conviction based on evidence proving the offence and

attributing it to the accused or acquitting the accused of the charge based on exculpatory evidence.¹

Accordingly, the discretionary power of the criminal judge is, as a general rule, governed by the principle of the judge's freedom to form his conviction. This is reflected in granting the trial judge the liberty to rationally and logically assess the probative value of the evidence presented with reasoned justification to arrive at a precise

¹ Mohamed Ali Al-Kik, *The Discretionary Power of the Criminal Judge in the Application, Aggravation, Enforcement, and Suspension of Sentences* (Alexandria: University Publications House, 2007), 13, 15.

and well-examined truth.² Although the Algerian legislator has specified the means of proof in Articles 212 to 238 of the Code of Criminal Procedure, there are exceptions in certain offences where the legislator has restricted the judge's discretionary power to be convinced by the evidence. For instance, in the offence of adultery, as stipulated by Article 341 of the Penal Code.

The significance of the criminal trial judge's conviction based on a particular piece of evidence lies in the mandatory requirement to provide reasoning for such conviction, both factually and legally, by the principle of a fair trial. The Algerian legislator obliges the criminal trial judge to specify the evidence upon which his belief is based, which served as the foundation for his conviction, whether for acquittal or conviction.³

In light of the foregoing, the following research problem may be formulated:

What are the constraints established by the Algerian legislator regarding the discretionary power granted to the criminal trial judge in selecting and being convinced by the evidence discussed during the trial?

To answer this question, the descriptive-analytical method has been adopted by analysing the legal texts related to the subject and examining the constituent elements of the topic. Accordingly, this article shall be divided into two main sections. The first section addresses the constraints related to the evidence upon which the criminal trial judge bases his conviction. The second section examines the constraints governing the judge's freedom to be convinced by the evidence, according to his discretionary authority.

First: Constraints Related to the Evidence upon Which the Criminal Trial Judge Bases His Conviction

Evidence is the proof or argument from which the criminal trial judge justifies his conviction, whether it leads to acquittal or conviction. Evidence may be direct, such as

confessions, witness testimony, or in situ inspection, or indirect, such as circumstantial evidence.⁴

However, the Algerian legislator has established specific constraints in the field of criminal evidence concerning the type of evidence upon which the criminal trial judge may base his conviction. Thus, the evidence must be lawful, and it must have been subject to discussion during the trial proceedings.

1. Reliance on Lawful Evidence

Under the principle of discretionary power, the criminal trial judge enjoys broad freedom to accept evidence, whether incriminating or exculpatory. However, the law requires that such evidence must have been obtained through lawful means, that is, through methods defined and regulated by law. This includes the legality of the investigation and searches for evidence, how it is obtained, and how it is presented and established before the court, all by procedures designed to ensure a fair balance between the state's right to prosecute and the accused's right to sufficient guarantees that safeguard human dignity and constitutionally protected fundamental rights.⁵

It is the responsibility of the criminal trial judge to examine the legality of the evidence presented to him in the context of the case under review. This examination must occur before the judge exercises discretion in assessing the evidence, ensuring that it is lawful and the result of proper legal procedures. This requirement is in application of Article 1 of the Code of Criminal Procedure, which stipulates: "This law is based on the principle of legality and fair trial...".⁶ By the procedural legality principle, unlawful evidence must not be accepted, whether it aims to establish the accused's innocence or guilt. In other words, evidence must be sought and obtained in compliance with the procedures prescribed by the applicable laws and regulations.⁷

⁴ Djilali Baghdad, *Judicial Practice in Criminal Matters*, vol. 1, 1st ed. (Algiers: National Office for Educational Works, 2003), 73.

⁵ Radia Khalifa and Mahira Nassira, "Limits of the Judge's Authority in Evaluating Criminal Evidence," *Academic Journal for Legal Research* 13, no. 21 (2022): 446, Abderrahmane Mira University of Béjaïa, Algeria, accessed May 30, 2025, <http://asjp/cerist.dz/en/article/209450>.

⁶ Article 1 of the *Code of Criminal Procedure*, as amended by Law No. 17-07 of March 27 2017, modifying and supplementing Ordinance No. 66-155 of June 8 1966, *Official Gazette of the People's Democratic Republic of Algeria*, no. 20, March 29 2017.

⁷ Mokhtar Sadoud, "Limits of the Discretionary Power of the Algerian Criminal Judge in Evaluating Evidence," *Journal of*

² Ghliiss Bouzid, *The Interdependence of the Principle of Free Evidence and the Criminal Judge's Conviction: A Comparative Analytical Study between Algerian Law, Egyptian Law, and Selected Arab Laws* (Algeria: Al-Huda Publishing and Distribution, 2010), 113-114.

³ Abdelkrim Manasria, "The Reasoning of Criminal Judgments and Its Impact on the Discretionary Power of Criminal Court Judges under Law No. 17-07 Amending the Code of Criminal Procedure," *Voice of Law Journal* 9, no. 1 (2022): 870, Djilali Bounaama University of Khemis Miliana, Algeria, accessed May 30, 2025, <http://asjp/cerist.dz/en/article/203656>.

Evidence obtained through unlawful means shall not be admitted, even if it appears to support the conviction. For instance, a search of a residence conducted without a warrant during which tools and means used by the perpetrator to commit the crime were discovered is not considered legally admissible proof. Accordingly, the Algerian legislator has adopted the approach of invalidating unlawfully obtained evidence and relying solely on lawful evidence. This reflects a commitment to upholding the fundamental rights and freedoms of citizens guaranteed by the Constitution.

Accordingly, procedural legality must establish judicial certainty, even when the factual truth differs from the judicial truth.⁸ For example, consider a theft committed by scaling an enclosure during the night. Such acts constitute the felony of aggravated theft, as defined and punishable under Article 353 of the Penal Code.⁹ However, if the judicial police fail to conduct a crime scene inspection and do not include an inspection report in the case file, and although the victim provides a compact disc containing video footage proving the act of scaling, the camera used to capture the footage was not legally authorised. In this case, the judge may suffice with establishing a simple theft, as defined and punishable under Article 350 of the Penal Code.¹⁰ Even though the facts indicate that the act constitutes the felony of aggravated theft, the video evidence, having been recorded without legal authorisation, is deemed unlawful and must be excluded from the basis of the conviction. Accordingly, the criminal judge may not rely, whether in issuing a judgment of acquittal or conviction, on evidence obtained through unlawful means that contravene the procedural rules stipulated in the applicable legal and regulatory texts.¹¹ Although the Algerian legislator has adopted the principle of procedural legality about both incriminating and exculpatory evidence under the wording of Article 1 of the Code of Criminal Procedure, which states, "This law is based on the principle of legality", the principle of the presumption of innocence, enshrined in Article 45 of the 2020 Constitutional Amendment,¹² The principle that

doubt must be interpreted in favour of the accused, as provided in Article 1 of the Code of Criminal Procedure, must also be observed.¹³ Therefore, while evidence obtained in violation of the prevailing legal and regulatory provisions must be excluded, such evidence may give rise to reasonable doubt concerning the accused's innocence.

2. The Role of Evidence Discussed during Trial Proceedings in Forming the Criminal Judge's Conviction

Evidence alone is not lawful; it must also be discussed during the trial proceedings. A judge may not form his conviction based on evidence that has not been subject to discussion during the hearings, according to paragraph two of Article 212 of the Code of Criminal Procedure, which states: "The judge may base his decision only on the evidence presented during the pleadings and discussed in open court."¹⁴ The term "open court," as referenced in Article 212 of the Code of Criminal Procedure, refers to the presence of the parties, the accused, the prosecution, the victim as a civil party, and the witnesses. Although the parties are present and confronted with their counterparts, the session may be public, which is the general rule, or it may be held on camera. This does not contradict the requirement that the evidence upon which the criminal trial judge bases his judgment must be discussed.

Accordingly, any evidence not examined during the trial session shall be excluded. The criminal trial judge cannot base his ruling on evidence not discussed in court, even if it has been addressed in the judicial police report. The judge must rely on at least one piece of evidence discussed in court to issue a judgment; otherwise, the ruling will be flawed due to a breach of the law and subject to appeal by cassation before the Supreme Court under Article 500 of the Code of Criminal Procedure.¹⁵

Second: Constraints Governing the Criminal Trial Judge's Freedom to Be Convinced by Evidence by His Discretionary Power

Transport Law and Port Activities 5, no. 1 (2018): 59, Mohamed Ben Ahmed University - Oran 2, Algeria, accessed May 30, 2025, <http://asjp.cerist.dz/en/article/126764>.

⁸ Massoud Zoubda, *The Criminal Judge's Personal Conviction* (Algiers: National Book Company, 1989), 91-92.

⁹ Article 353 of the *Penal Code*, as amended by Law No. 24-06 of April 28 2024, *Official Gazette of the People's Democratic Republic of Algeria*, no. 30, April 30 2024.

¹⁰ Article 350 of the *Penal Code*, as amended by Law No. 24-06, *ibid*.

¹¹ Ghliiss Bouzid, *op. cit.*, 117.

¹² Article 41 of the *2020 Constitutional Amendment*, Presidential Decree No. 20-442 of December 30 2022, concerning the promulgation of the constitutional amendment approved by the

referendum of November 1 2020, *Official Gazette of the People's Democratic Republic of Algeria*, no. 82, December 30 2020.

¹³ Article 1 of the *Code of Criminal Procedure*, from Law No. 17-07, *op. Cit*.

¹⁴ Paragraph 2 of Article 212 of Ordinance No. 66-155 of June 8 1966, concerning the *Code of Criminal Procedure*, *Official Gazette of the People's Democratic Republic of Algeria*, no. 48, June 10 1966.

¹⁵ Article 500 of the *Code of Criminal Procedure*, as amended by Law No. 82-03 of February 13 1982, *Official Gazette of the People's Democratic Republic of Algeria*, no. 7, February 16 1982.

Article 212 of the Code of Criminal Procedure states, in paragraph one, that "Crimes may be proven by any method of proof, except in cases where the law provides otherwise, and the judge may issue his judgment according to his personal conviction."¹⁶ From the wording of paragraph one of Article 212, it is evident that the Algerian legislator has, as a general rule, granted complete freedom in the selection of means of proof. However, this freedom is restricted in certain crimes by specific legal provisions. Likewise, the legislator has conferred upon the criminal judge broad discretionary power in forming his conviction. Thus, the criminal trial judge enjoys general freedom to be convinced by the evidence. Nevertheless, this freedom is limited as the judge's discretionary power in evaluating evidence may be legally restricted by exception.

1. Complete Discretion of the Criminal Judge in Conviction Based upon Evidence as a General Principle

As a general principle, the discretionary power of the criminal judge regarding conviction based on evidence operates through the formation of a judicial conviction founded upon admissible evidence. Such evidence must have been lawfully obtained by means explicitly prescribed in applicable laws or current regulations and must have been presented during the proceedings and discussed by the parties involved. However, this requirement does not constrain Algerian legislators from granting the parties complete freedom to submit any evidence supporting their claims. Nor does it restrict the criminal judge in selecting the evidence upon which conviction is based. Consequently, the criminal judge possesses broad discretionary authority to rely on various proof methods and assess their respective elements. The judge is thus entirely free to establish conviction upon any evidence provided; nevertheless, the judge must justify the choice and reliance upon such evidence.¹⁷ Therefore, the Algerian legislature explicitly obliges the criminal judge to substantiate the judgment by providing reasoning related directly to the evidence on which the decision rests. This requirement underscores the necessity of reasoned criminal judgments, particularly in misdemeanour, contravention, and even felony cases. This principle was explicitly affirmed in Article 169 of the 2020 Constitutional Amendment: "Judgments and judicial orders shall be reasoned. Judicial rulings shall be pronounced in open court sessions."¹⁸ Similarly, Article 1, paragraph 5 of the

Code of Criminal Procedure states: "In all cases, doubt shall be interpreted in favour of the accused."¹⁹

The Supreme Court has emphasised in numerous rulings the necessity of reasoned criminal judgments, particularly when examining appeals submitted by judicial councils.²⁰ It has specifically addressed issues concerning the judge's discretion in evaluating evidence,²¹ Affirming that the absence of reasoning in criminal judgments leads to the cassation and annulment of such decisions.²² Consequently, it is evident that while Algerian legislation generally does not restrict the judge's discretion in assessing evidence, it nonetheless mandates that judges provide reasons for their decisions. This reasoning requirement reinforces the principle of fair trial and constitutes an essential safeguard protecting the rights of the accused during judicial proceedings.

2. Restrictions on the Discretionary Power of the Criminal Judge in Conviction Based upon Evidence as an Exception

Although the legislature has, as a general principle, granted parties complete freedom in criminal matters to provide proof through any evidentiary means and similarly afforded the criminal judge freedom in forming personal conviction, the judge's discretionary power rooted in the principle of personal conviction and the liberty to rely upon any lawful evidence presented during trial proceed-

¹⁹ Article 1 of the *Code of Criminal Procedure*, as amended by Law No. 17-07, *op. Cit.*

²⁰ The Supreme Court ruled that: "While it is necessary for judgments and decisions issued by courts adjudicating misdemeanours and infractions to include both reasoning and operative parts in accordance with Article 379 of the Code of Criminal Procedure, the judgments of the criminal courts must include the questions put forward and the corresponding answers in accordance with Article 314, paragraph 7, of the same code, as these serve as the reasoning." See: Decision dated October 23 1990, Criminal Chamber, Appeal No. 75935, *Judicial Journal of the Supreme Court*, no. 2 (1992): 182.

²¹ The Criminal Chamber of the Supreme Court held on March 5 1981, in Appeal No. 22316, that: "The issue of the trial judges' conviction is conditional upon, and necessarily requires, the reasoning of their decision without contradicting the elements present in the case file and the discussions held thereon." See: Decision dated March 5 1981, Criminal Chamber, Appeal No. 22316, in Djilali Baghdad, *Jurisprudence in Criminal Matters*, vol. 3, 1st ed. (Algiers: National Office for Educational Works, 2001), 193.

²² "A judgment by the court of appeal is inadequately reasoned and must be quashed if it upholds a first-instance ruling that fails to specify the acts attributed to the accused or the relevant legal provisions." See: Decision dated May 29 1984, Criminal Chamber, Appeal No. 27148, *Judicial Journal of the Supreme Court*, no. 1 (1990): 275.

¹⁶ Paragraph 1 of Article 212 of Ordinance No. 66-155, concerning the *Code of Criminal Procedure*, *op. Cit.*

¹⁷ Salem Aloui, *Means of Proof in Criminal Investigation* (Master's thesis, Criminal Law and Criminal Sciences, Faculty of Law, University of Algiers 1, 2016-2017), 22.

¹⁸ Article 169 of the *2020 Constitutional Amendment*.

ings is subject to oversight by the Supreme Court exclusively concerning the reasoning provided for such conviction. Nevertheless, this freedom is not absolute. The legislature has introduced certain constraints and exceptions to limit this discretionary power regarding evidentiary matters, which the criminal judge must comply with when forming personal conviction. These restrictions safeguard society's interests and protect individuals' rights and freedoms.²³

The exceptions to the criminal judge's discretionary power principle regarding personal conviction based upon evidence involve particular evidentiary documents possessing probative authority that may only be challenged through allegations of forgery. Such documents include official inspection reports and customs records, upon which the judge is compelled to base the judgment, as these records carry conclusive probative weight and are contestable solely by claims of forgery. These records are addressed explicitly in Article 218 of the Code of Criminal Procedure: "Documents recorded in official reports have probative force until challenged for forgery. Such matters are regulated by specific laws, or, in the absence of explicit provisions, forgery challenges are governed by the procedures outlined in Book V, Chapter I, of this Code."²⁴ Accordingly, these reports, whether inspection reports drafted by the Labour Inspectorate by Article 7 of Law No. 90-03 relating to Labour Inspection,²⁵ Alternatively, customs reports are prepared by at least two officials affiliated with the customs administration.²⁶

Moreover, the law has conferred exceptional probative value upon specific official reports. Although, as a general rule, such reports are regarded like any other means of proof and thus fall within the discretionary power of the criminal judge, the law has made exceptions for specific reports by granting them a particular evidentiary status. This means that they possess conclusive probative force, and the contrary of what is stated therein may not be proven. This principle is established in Articles 216, 218, and 400 of the Code of Criminal Procedure.²⁷

In such cases, it is insufficient for the accused to deny the facts stated in the official report. The accused must present evidence or indications capable of refuting the report's content. It is, therefore, incumbent upon the accused to prove the contrary of what is contained in the report, and such proof must be established through written evidence or witness testimony by the provisions of Article 216 of the Code of Criminal Procedure. Furthermore, even doubt is not interpreted in favour of the accused in these circumstances.²⁸

Furthermore, by way of exception, the legislator may restrict the means of proving certain offences, such as the offence of driving under the influence of alcohol. Proof of this offence must be established through expert analysis, specifically by measuring the blood alcohol content to confirm the required level, which must be equal to or exceed 0.20 grams.²⁹ It is, therefore, impermissible to prove this offence merely by the sense of smell or by observing an open bottle of alcohol inside the vehicle. As such, the law obliges the judge to base the ruling exclusively on this type of evidence; if such evidence is absent, the judge must acquit the accused.

Likewise, the Algerian legislator has imposed restrictions on the means of proof in the offence of adultery, as defined and penalised under Article 339 of the Penal Code. The evidentiary methods are exhaustively listed in Article 341 of the Penal Code and include the flagrante delicto report, a judicial decision, or correspondence between the parties. Outside these specific instances, the offence cannot be proven. Moreover, a public prosecution for this offence may only be initiated based on a complaint filed by the aggrieved spouse. In the absence of such a complaint, the public prosecution cannot, under any circumstances, be brought, nor may a conviction be secured against the unfaithful spouse for the offence of adultery. This holds even where witness testimony, photographs, or videos support factual evidence of infidelity. Even though such elements may generally constitute admissible forms of evidence, they are deemed unlawful in the context of adultery due to the legislator's restriction

²³ Abdelkader Habbas, "Exceptions to the Principle of the Criminal Judge's Personal Conviction in Algerian Legislation," *Journal of Law and Human Sciences* 15, no. 2 (2022): 166, 170. Ziane Achour University of Djelfa, Algeria. Accessed May 30, 2025. <http://asjp/cerist.dz/en/article/193531>.

²⁴ Article 218 of Ordinance No. 66-155, concerning the *Code of Criminal Procedure*, *op. cit.*

²⁵ See: Article 7 of Law No. 90-03 of February 6 1990, concerning the *Labour Inspectorate*, *Official Gazette of the People's Democratic Republic of Algeria*, no. 6, February 7 1990.

²⁶ Abdelkader Habbas and Abdelrazak Khamra, *op. cit.*, 170.

²⁷ Nassima Abdoun and Ahmed Boulmekahal, "The Freedom and Limits of the Criminal Judge's Personal Conviction in

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²⁸ Abdelkader Al-Arabi Chahhat and Nabil Saqr, *Evidence in Criminal Matters in Light of Jurisprudence and Judicial Doctrine* (Algiers: Al-Huda Publishing and Distribution House, 2006), 482.

²⁹ Nassima Abdoun and Ahmed Boulmekahal, *op. cit.*, 59.

of admissible means of proof to those expressly enumerated in Article 341 of the Penal Code.³⁰

II. Conclusion

In conclusion, the Algerian legislator has granted the criminal trial judge broad discretionary power to form convictions based on evidence as a general principle. However, this discretionary power concerning personal convictions drawn from evidence is not absolute; it is subject to exceptions and limitations.

This article has led to several findings and proposals based on the foregoing.

1. Findings

These findings can generally be summarised as follows:

- The Algerian legislator has identified the means of criminal proof within the Code of Criminal Procedure and, as a general rule, has accorded them equal evidentiary value.
- The legislator has established certain constraints regarding the evidence upon which the criminal judge may base conviction, requiring that the evidence be lawful and duly examined in an adversarial hearing between the parties.
- The judge must provide a reasoned judgment based on personal conviction formed from legally obtained evidence, which must have been debated in open court.
- The constitutional legislator acted judiciously in stipulating the requirement for judicial decisions to be reasoned, as the reasoning of judgments enables parties to scrutinise the justification behind the criminal judge's conviction.
- The legislator has established regulations governing the criminal trial judge's freedom to form convictions based on evidence by their discretionary power. This has been achieved by granting the judge full liberty, as a general principle, to be convinced by any evidence while obliging them only to provide reasoning for the judgment.
- However, the legislator has introduced certain exceptions by limiting the judge's discretionary power in evaluating evidence, granting some forms of evidence probative value that can only be challenged by contrary proof. Other forms of evidence have conclusive probative force and may only be contested through a claim of forgery.

Such evidence cannot be disregarded by the judge, who is bound by it.

- The legislator has also restricted the discretionary power of the criminal trial judge in evaluating evidence, as an exception, by limiting the admissible evidence in certain offences such as adultery and driving under the influence of alcohol.

2. Proposals

This article has arrived at several proposals to reinforce the judge's discretionary authority in forming evidence-based convictions. These are as follows:

- The legislator should refrain from assigning equal probative value to all forms of evidence. For example, judicial medical expertise in DNA analysis should not be considered equivalent to witness testimony, nor should confessions be treated as equal to witness statements.
- Unlawfully obtained evidence should, in cases of doubt regarding the accused's innocence, be admissible by way of reference if such evidence supports the exoneration of the accused.
- Judicial decisions based on evidence not discussed during adversarial proceedings or obtained unlawfully must be deemed null and void. The Supreme Court should automatically quash and annul such decisions. Furthermore, to better protect litigants' rights, the Supreme Court should prioritise the substance of appeals over its formal structure.
- The legislator acted commendably in granting probative authority to customs reports, as they reinforce the protection of public interest, given that the perpetrator of a customs offence inevitably seeks to harm the national economy.
- The probative value of inspection reports prepared by the judicial police should be strengthened, particularly in instances of flagrante delicto, as provided for in Article 41 of the Code of Criminal Procedure.
- Restricting the means of proof in the offence of adultery has rendered its establishment unduly difficult, thereby undermining the rights of many victims. It would have been more appropriate to tighten evidentiary requirements not by limiting admissible evidence but rather by requiring the presence of at least two pieces of evidence.

³⁰ Article 341 of Ordinance No. 66-156 of June 8 1966, concerning the *Penal Code, Official Gazette of the People's Democratic Republic of Algeria*, no. 49, June 10 1966.

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