

***The Role of the Civil Judge's Discretionary Power in Achieving Justice*****Dr. Bouchria Nassima ^{1,*}****¹ Lecturer in the Department of Law at Ahmed Zabana University, Relizane, (Algeria), nassima.bouchria@univ-relizane.dz****Received:** 01 / 03 / 2025**Accepted:** 19 / 12 / 2025**Published:** 11 / 06 / 2026**Abstract:**

The development of the idea of the discretionary power of the judge came in line with the development of the most mature human thought, which preferred to resort to a just and honest person to claim the lost right, by placing full confidence in this person who is the judge in order to restore the lost right based on the legal texts that distinguish What is the difference between the normal behavior of the individual and his abnormal behavior, and the principle of the necessity of separating the judge in all cases before him without invoking any argument such as the absence of legal texts, was established by giving him discretionary authority in choosing the appropriate legal text and in its interpretation and application, but more than That is, in the absence of a legal text, the judge decides by his personal judgment after all other sources of law have been enforced, and he must give the judge the discretionary power to settle disputes, which is an important principle in achieving justice.

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Introduction:

The concept of the civil judge's discretionary power, which has now become a legally enshrined principle in most branches of law, is an ancient notion that dates back to the emergence of human civilizations and legal systems. This concept has oscillated between the judge's absolute discretionary authority and a strictly restricted discretion under the ruler's control. Over time, it has evolved into a legal principle governed by statutory constraints, whereby the judge is granted a limited scope to adjudicate based on their own judgment, conviction, and personal assessment.

The concept of the civil judge's discretionary power represents the active role that the civil judge plays in resolving disputes brought before them, particularly when no legal provision directly applies to the case or when the judge must exercise their own judgment in matters requiring discretion. This concept holds great significance in the judicial field, as it not only imposes on the judge the responsibility of adjudicating disputes based on their own assessment but also prevents them from refusing to rule on certain cases under the pretext of an absence of applicable legal provisions. It is the judge's duty to decide on all disputes within their territorial and subject-matter jurisdiction; otherwise, they would be committing what is known as a denial of justice.

Accordingly, this study will seek to examine the emergence and development of the concept of judicial discretionary power through the historical evolution of legal systems, from ancient legislations to Algerian legislation. This will be addressed in two sections: the first section will be dedicated to analyzing the historical development of the civil judge's discretionary power in primitive societies and ancient legal systems, while the second section will focus on the stance of the Algerian legislator on the concept of judicial discretionary power in civil matters.

1.The Historical Origins of the Concept of the Civil Judge's Discretionary Power in Primitive Societies and Ancient Legal Systems

The concept of the judge's discretionary power is one of the legal principles that have been established through continuous and sustained judicial practice over time, which is referred to as the historical origins of legal rules. This concept is embodied in the active role played by the judge in adjudicating cases in a particular manner based on their own perspective, in accordance with the law. The enshrinement of this legal principle began in primitive societies, then in ancient legal systems, and eventually in modern legal frameworks. Accordingly, this section will seek to clarify the development of the concept of judicial discretion, beginning with its evolution in primitive societies in the first subsection, followed by its development in ancient legal systems in the second subsection.

1.1. The Emergence of the Concept of Judicial Discretion in Primitive Societies

When discussing primitive society (Roscoe , 1967, p. 40), we refer to its composition, which is centered around its most fundamental unit—the family—both in its broad and narrow sense, where members are bound by ties of kinship and blood. During this era, the prevailing concept was that of absolute submission to paternal authority; the father was the sole authority responsible for establishing rights and obligations, as well as adjudicating disputes among family members (Wasel,, n.d, p. 28). As a result, he exercised absolute power in managing both the personal, financial, and even spiritual affairs of his family.

With the development of societies and the expansion and complexity of social relationships, disputes and conflicts among family members, as well as within clans and tribes, became more frequent. As a result, individuals came to perceive force and vengeance as the most effective means of protecting their rights and property in the event of an attack. In this context, the father was the authority responsible for determining what constituted an act of aggression, how to respond to it, and to what extent. He alone, or with the assistance of his family members, would carry out the punishment (Suleiman, 1984, p. 190).

Thus, in primitive societies, the father had absolute ownership over his family members and controlled all aspects of their lives. He also played the role of judge and enforcer of punishment in the event of disputes, regardless of their nature.

With the evolution of human thought, the establishment of stability, and the gradual shift toward reason, wisdom, and maturity, the notion of force, vengeance, and violent conflict

resolution began to fade. Instead, individuals turned to the idea of arbitration, seeking the judgment of a wise, rational, and experienced figure to resolve disputes arising within the clan or tribe. This role was often assumed by the eldest member of the clan or the tribal leader, who came to replace the father's absolute authority in adjudicating conflicts. (**Bougaba, 2009, p. 10**)

At this stage, the concept of the arbitrator's absolute discretionary power emerged, allowing them to resolve disputes and issue rulings solely based on their own judgment, with no possibility of opposition, appeal, or refusal of their decision (Fadel, 2006, p. 23). This phase was later followed by the evolution of judicial discretion with the emergence of the judge as an individual figure and the establishment of a formal judicial system.

1.2. The Emergence of the Concept of Judicial Discretion in Ancient Legal Systems

With the expansion of clans and tribes and the increase in population growth, social relationships became more complex and diversified alongside the development of various aspects of life. As a result, disputes and conflicts became more frequent, necessitating the regulation of these human groups through their integration into a defined state entity and their subjection to a set of laws and regulations that would govern their lives and resolve their disputes. This led to the emergence of the first states and the earliest legal systems, among which the most significant were the Mesopotamian, Egyptian, Greek, and Roman legislations. The following section will examine these legal systems in greater detail:

1.1.1. The Emergence of the Concept of Judicial Discretion in Mesopotamian Legislation (Iraqi Legal Systems)

Mesopotamia is regarded as the cradle of the earliest human civilizations, and its societies developed a series of legal codes to regulate social life, including Sumerian and Babylonian laws (**Serrar, 1993, p. 9**). Among these, the Code of Hammurabi stands out as the first written codified law, making it one of the most significant legal systems. This code introduced legal provisions governing family relations, property, the judiciary, and the separation of religion from the state.

Regarding the emergence of judicial discretion in Mesopotamian legal systems, it can be said that this concept did not exist during that era. This was due to the dominance of the absolute rule of the sovereign, who held supreme authority to enact laws as he deemed appropriate. Judges were strictly bound to apply these laws verbatim, with no room for personal interpretation or deviation. Likewise, individuals were required to comply with these laws without objection or opposition.

1.1.2. The Emergence of the Concept of Judicial Discretion in Ancient Egyptian Legislation

Ancient Egyptian civilization witnessed the development of several legal codes, the most notable of which was the Code of Bokchoris, which was influenced by the Code of Hammurabi (**Sufi, 2007, pp. 74-75**). However, it distinguished itself by expanding its scope to cover all aspects of social life. One of its most significant innovations was the introduction of a two-tier judicial system, marking a historical precedent. (**Al-Fadl, 1996, p. 32**)

Despite these advancements, the Code of Bokchoris did not establish the concept of judicial discretion in issuing rulings. This was due to the dominance of absolute rule and the lack of separation of powers. The judiciary was entrusted to the executive authority, with the vizier serving as both judge and administrative official (**Fadel, 2006, p. 32**). As a result, judicial decisions were merely an extension of the sovereign's will, implemented by the executive branch through its control over the judicial system.

1.1.3. The Emergence of the Concept of Judicial Discretion in Greek Legislation

Ancient Greek society was characterized by a diverse judicial structure, where legal disputes were resolved either through tribal chiefs or by religious authorities, such as priests. Additionally, Greek society was highly stratified, which led to inconsistent, unequal, and unstable judicial rulings. This lack of stability, fairness, and equality in the judicial system eventually fueled public unrest, culminating in a revolution that brought about significant political and legal reforms.

One of the earliest legal reforms was the Draconian Code, enacted in the late 7th century BCE, which imposed severe and rigid laws in an attempt to establish order. However, it was later replaced by Solon's Code, which was more aligned with the demands of the Greek people and

introduced reforms aimed at creating a fairer and more structured legal system. (**Bougaba, 2009, p. 15**)

These aforementioned legal codes played a crucial role in establishing clear legal rules that upheld justice and equality. Additionally, they reinforced the concept of absolute judicial discretion among rulers and judicial authorities, particularly in criminal cases regarding the classification of offenses and the determination of appropriate punishments. In exercising this discretion, judges relied on their assessment of the offender's intent, evaluating personal traits, and forming judgments based on their inner convictions and personal sentiments.

However, this notion of absolute judicial discretion faced significant criticism, as it was entirely dependent on the judge's subjective perceptions, emotions, and personal viewpoints. Among its critics was Aristotle, who strongly opposed the application of such discretion in judicial proceedings. He argued for a clear distinction between administrative and judicial functions, stating in his work *Politics* that discretion is an administrative characteristic. According to him, administrative decisions must take into account time, individuals, and specific circumstances, requiring the executive authority to reason and exercise discretion wisely in implementing governmental policies. In contrast, judicial functions should not involve any discretionary power, as courts must apply legal principles uniformly without distinguishing between cases based on subjective considerations. (**Roscoe , 1967, p. 68**)

1.1.4. The Emergence of the Concept of Judicial Discretion in Roman Legislation

The Roman civilization (**Al-Saadani, 1998, pp. 35-36**) is regarded as one of the most significant legal traditions that laid the foundation for intellectual and legal maturity. This was achieved through the efforts of Roman rulers, who worked diligently to codify and compile legal texts, creating a comprehensive legal framework. These legal codifications later became the cornerstone of many modern legal systems, most notably French law. (**Fodil, 1999, p. 40**)

One of the most significant Roman legal codifications was the Law of the Twelve Tables, which emerged as a result of popular uprisings against the absolute rule of magistrates and religious authorities, who had exclusive knowledge of legal norms without making them publicly accessible. This led to the formal codification and public display of laws, ensuring that legal rules were known to all citizens. (**Al-Mubashir,, 2002, p. 46**)

This law was introduced to implement the Law of the Twelve Tables and established the position of the judicial magistrate (praetor). The praetor was entrusted with examining legal disputes from a procedural standpoint without ruling on their substance. The final decision on the case was assigned to a single judge, selected from an official list of candidates. (**Bin Melha, 2000, p. 11**)

With the evolution of Roman society and the advancement of the concept of justice, the role of the judicial magistrate (praetor) expanded beyond merely examining procedural aspects of lawsuits. It grew to include judicial interpretation and the development of legal principles to resolve disputes. This expansion led to the creation of legal fictions and the use of analogy in adjudication, giving civil judges a more active role in identifying defects in consent and examining contractual validity. Additionally, judges could refer to legal scholars' opinions, which played a crucial role in the development of legal thought and the adaptation of laws to new legal issues (**Al-Mubashir,, 2002, pp. 59-60**).

However, despite this progress, the judicial magistrate remained a representative of the emperor's will. He could not introduce any judicial interpretation or legal principle that was not approved by the emperor or that contradicted imperial interests. As a result, judicial discretion remained limited, primarily due to the lack of separation of powers and the overlapping of judicial and executive authority.

Thus, the concept of judicial discretion became more firmly established during the Middle Ages, a period marked by legal thought development driven by political and religious conflicts surrounding this idea.

With the advent of the European Renaissance and the transition into the modern era, particularly from the 18th century onward, law witnessed significant intellectual maturity. This was largely due to philosophers and legal scholars critically analyzing and challenging various

legal concepts. As a result, the principle of separation of powers was firmly established, granting judges judicial immunity and reinforcing their active role in dispute resolution. Judicial discretion was formally recognized—not as an absolute power but as a limited authority, allowing judges to exercise discretion in certain matters while remaining bound by legal constraints.

In the following section, we will examine the evolution of judicial discretion within Algerian legislation.

2. The Position of the Algerian Legislator on the Concept of Judicial Discretion in Civil Law

As is historically known, Algeria has undergone two distinct phases: the colonial period under French rule and the post-independence period. During colonial rule, the applicable laws were primarily French, except in matters governed by Islamic law. In the post-independence era, due to a legal vacuum, the Algerian legislator initially maintained the application of French legislation, except for provisions contrary to Algeria's sovereignty and Islamic law, until the enactment of an independent Algerian legal framework.

Accordingly, the following sections will examine the emergence of judicial discretion in Algerian civil law before independence (Section One), followed by its development after independence (Section Two).

2.1. The Emergence of the Concept of Judicial Discretion in Algerian Civil Law Before Independence (During the French Colonial Period)

By examining the history of ancient Algeria, we find a complete absence of the concept of judicial discretion in civil law until the Islamic conquest of Algeria in the 8th century AD, when the principles of Islamic law were implemented. This introduced the concept of judicial discretion under the term *ijtihad* (judicial reasoning). The application of *ijtihad* continued under Ottoman rule, with fluctuations between restriction and flexibility in its scope (Bin Melha, 2000, p. 26).

With the arrival of the French colonizer in Algeria in the 18th century, efforts were made to eradicate all foundations of the Algerian Muslim identity. As a result, the application of Islamic law in judicial institutions was abolished, except for matters related to personal status. This was enforced through the Royal Ordinance of 1834 (Bouail, 2004, p. 21). (Herzallah, 2007, p. 15)

At the beginning of the 20th century, the French colonizer also attempted to abolish the application of Islamic law, even in personal status matters, by seeking to codify family law through the "Moran and Mousquet Project." This initiative involved translating Mukhtasar Khalil by Ibn Ishaq (Assiyat, 2002, pp. 15-16) and forcing Muslim personal status judges to strictly adhere to its provisions, thereby restricting their judicial discretion and ability to engage in *ijtihad* (independent reasoning) in matters of Islamic law.

However, this codification faced strong opposition and was ultimately abandoned, remaining nothing more than ink on paper. Despite this, the colonial authorities continued their efforts by issuing several laws addressing specific aspects of personal status matters, such as the Law of May 2, 1930, which dealt with engagement and the legal age of marriage, the Decree of May 19, 1932, concerning the legal status of Algerian women, the Ordinance of November 23, 1944, which regulated the organization of Islamic judiciary, and finally, the Law of July 11, 1957, which governed the regulation of marriage and its dissolution in Algeria. (Bahi, 2004, p. 184)

What can be said about the existence of the concept of judicial discretion in civil matters during this colonial period in Algeria is that, although this idea was effectively and practically established in the French judiciary, it cannot be considered part of Algerian legislation except in relation to the application of Islamic law. This is due to the absence—if not the total lack—of an independent Algerian legal framework, as well as the absence of independent will and national sovereignty.

And this period came to an end with the uprising of the Algerian people and their attainment of independence in 1962.

2.2. The Development of the Concept of the Civil Judge's Discretionary Power in Algerian Legislation After Independence

After gaining independence in 1962, Algeria found itself in a state of legislative vacuum due to the absence of Algerian legal texts. This led to the issuance of Law No. 62-157, which mandated the continued application of French legislation, except for provisions that conflicted

with national sovereignty and the principles of Islamic law. Article 2 of this law stated that “any legislative text is null and void if it undermines national sovereignty, is inspired by colonial motives, has a discriminatory nature, or infringes upon the natural exercise of democratic freedoms. (**Law No. 62-157 of December 31, 1962, 1962, p. 18**)”

Through this article, the Algerian legislator granted the judge discretionary power to distinguish between applicable legal rules that do not conflict with national sovereignty and Islamic law. In cases where such legal rules cannot be applied, the judge resorts to judicial interpretation to establish alternative legal principles and resolve the dispute before them.

Nevertheless, the Algerian legislator did not remain passive; rather, he worked on establishing a comprehensive legal framework by enacting national laws governing various aspects of life. These laws enshrined the judge's discretionary power—not as an absolute authority but as a limited one, constrained by the legal domain, circumstances, and statutory provisions, with varying degrees depending on the field.

One of the key areas where judicial discretion is enshrined is civil law. The Algerian Civil Code, enacted in 1975 by Ordinance 75-58 (**Ordinance No. 75-58 of Ramadan 20, 1395 , p. 990**), stands as one of the most significant legal texts affirming this concept. This is clearly reflected in Article 1, which states: "The law applies to all matters it explicitly or implicitly addresses. In the absence of a legislative provision, the judge shall rule in accordance with the principles of Islamic law; if none exist, then based on custom; if none exist, then based on natural law and the rules of equity."

Through this legal provision, the Algerian legislator granted judges discretionary power to establish legal rules through judicial reasoning when absent from the sources listed in Article 1 of the Algerian Civil Code. However, the binding nature of these rules, formulated under judicial discretion, is limited exclusively to the case at hand and the parties involved, without extending to other cases. These rules remain the product of judicial interpretation and are not mandatory for other judges, though they may serve as guidance or reference. This is because Algeria follows the Romano-Germanic legal system, which does not recognize the doctrine of judicial precedent.

Another key area where the discretionary power of the civil judge is enshrined is in the field of reparation for harm, which is based on the theory of tort liability as stipulated in Article 106—one of the most fundamental subjects of Algerian civil law. The civil judge has broad discretionary power in assessing harm, determining reparation, and evaluating evidence, all within the limits set by the law and with the assistance of experts and specialists in the field. In this way, the civil judge plays an active role in managing disputes and adjudicating cases brought before him.

Conclusion:

Finally, based on everything discussed, it can be said that the concept of judicial discretion in civil law has been established through the historical evolution of legal rules, which themselves developed alongside human thought. This shift moved away from aggressive interactions, abandoning the idea of revenge and self-administered justice, towards the concept of resorting to an impartial figure who ensures justice—the judge, acting within a judicial framework and bound by legal provisions. This evolution has paralleled societal progress, from the formation of tribes and clans to the emergence of states and the continuous advancement of legal systems throughout these stages.

Since it is sometimes impossible to anticipate all aspects of human life and create specific legal rules for every possible scenario, legal gaps inevitably arise in certain matters, necessitating judicial interpretation or granting judges discretionary power to determine the most appropriate legal rule to resolve disputes. Additionally, discretion is afforded in specific issues, such as reparation for harm, recognizing that judges are qualified professionals, both in terms of their legal education and the expertise gained from years of judicial practice. In practice, this concept allows judges to play a proactive role in resolving disputes, rather than merely applying legal rules in a rigid manner.

Bibliography

Books :

1. Osama Sarar,(1993),*The Code of Hammurabi and the Origin of Legislation in the Ancient East*, 2nd edition, Alaa Al-Din Printing, Publishing, and Distribution House, Damascus, Syria,.
2. Al-Ghawthi bin Malha,(2000), *Algerian Judicial Law*, National Office for Educational Works, Algeria.
3. Khaled Abdul Azim Bougaba,(2009), *Methods of Selecting Judges: A Comparative Study Between Islamic Sharia and Positive Legislations*, Dar Al-Kutub Al-Qanuniya, Egypt.
4. Roscoe Pound,(1967), *Introduction to the Philosophy of Law*, translated by Salah Al-Dabbagh, reviewed by Ahmad Salim, National Institution, Beirut, Lebanon.
5. Zidan Muhammad Fadel,(2006), *The Judge's Discretionary Power in Evaluating Evidence in Criminal Cases*, 1st edition, Dar Al-Thaqafa, Amman, Jordan.
6. Soufi Hassan Abu Talib,(2007), *History of Legal and Social Systems*, Dar Al-Nahda Al-Arabiya, Egypt.
7. Abdelkader Harzallah,(2007), *A Summary of the Rules of Marriage and Divorce*, Dar Al-Khalduniya, Algeria.
8. Ali Ali Suleiman,(1984), *Studies in Civil Liability in Algerian Law*, University Publications Office, Algeria.
9. Mohamed Lamine Bouail,(2004), *The Legal Status of Women in Algerian Family Law*, Dar Houma, Algeria.
10. Mahmoud Ibrahim Al-Saadani,(1998), *Roman Civilization*, 1st edition, Ain for Studies and Human and Social Research, Egypt.
11. Munther Al-Fadl, *History of Law*, Nabk Business Publications, Amman, Jordan, 1996.
12. Nadia Fodil,(1999), *Lectures in Introduction to Legal Sciences*, University Publications Office, Algeria.
13. Nasr Farid Mohamed Wasel, *The Judiciary and Judicial System in Islam*, Al-Waqfiya Library, No Date, No Place.
14. Yahya Mustafa Al-Mubasher,(2002), *History of Laws: Roman Law*, 1st edition, No Date, No Place.

Articles:

1. Bahi Al-Turki, *The Codification of Islamic Sharia*, Annals of Guelma University, Issue No. 2, Guelma University, Algeria, 2004.

Theses:

1. Al-Yazid Assiyat,(2002, *Divorce at the Wife's Request in Algerian Family Law*, Master's Thesis, Faculty of Law and Administrative Sciences, Department of Private Law, University of Algiers.

Laws and Ordinances:

1. Law No. 62-157 of December 31, 1962, *Official Gazette of the People's Democratic Republic of Algeria*, Issue No. 2, published on January 11, 1962, p. 18.
2. Ordinance No. 75-58 of Ramadan 20, 1395 AH, corresponding to September 26, 1975, containing *the Algerian Civil Code*, *Official Gazette of the People's Democratic Republic of Algeria*, Issue No. 78, Twelfth Year, published on Ramadan 24, 1395 AH, corresponding to September 30, 1975, p. 990.