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Artificial Intelligence in Judicial Decision-Making: Can a Robot Replace a Judge?

Tatia Dolidze

Ph.D in Law, Affiliated Professor at Georgian International University (GIU), Georgia

tatuli.dolidze@giu.edu.ge

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ABSTRACT

This article examines the concept of the "robot judge" and evaluates the legal, ethical, and human rights implications of using artificial intelligence in judicial decision-making. The study explores whether AI can partially or fully perform judicial functions and assesses the extent to which algorithmic tools may be integrated into courts without undermining the fundamental principles of justice. The article is based on doctrinal legal analysis, comparative review, and a human-rights-oriented approach. It distinguishes between administrative automation, decision-support systems, and fully automated adjudication, arguing that these forms of technological involvement raise different levels of legal concern. The paper demonstrates that AI may offer important benefits for judicial systems, including greater efficiency, faster case processing, improved consistency, and enhanced access to justice, especially in repetitive or low-value disputes. At the same time, the article identifies serious risks associated with algorithmic bias, lack of transparency, limited explainability, accountability gaps, and threats to the right to a fair trial. Attention is given to the relationship between AI and judicial discretion, emphasizing that legal reasoning is not a purely mechani-

cal exercise but a process involving interpretation, contextual evaluation, proportionality, and moral judgment. The article concludes that AI should not replace human judges in the exercise of final judicial authority. A legally acceptable model is the use of AI as a supportive instrument under meaningful human supervision, clear regulatory safeguards, transparency requirements, and effective mechanisms of review. Such an approach best reconciles technological innovation with the rule of law and the protection of human dignity.

INTRODUCTION

The rapid advancement of digital technologies and the expanding use of artificial intelligence (AI) across public and private sectors have fundamentally reshaped contemporary legal and institutional frameworks. This transformation is particularly visible in the field of justice, where increasing demands for efficiency, speed, consistency, and accessibility have encouraged the adoption of data-driven and algorithmic tools. The use of AI in judicial systems is no longer a speculative or purely theoretical matter. It is already associated with functions such as case allocation, legal research, document analysis, risk assessment, and other forms of decision support within courts. Against this background, the concept of the "robot judge" has emerged as one of the most provocative and controversial issues in modern legal scholarship. It raises a central question: can artificial intelligence partially or fully perform the functions traditionally exercised by a human judge?

The importance of this question lies not only in technological progress but also in the unique constitutional and social role of the judiciary. The administration of justice is among the most sensitive functions of the state, as it is directly connected with the rule of law, legal certainty, public confidence in courts, and the effective protection of human rights. Judicial decision-making cannot be reduced to the mechanical processing of information. It involves the interpretation of legal norms, the contextual assessment of facts, the balancing of competing principles and interests, the exercise of discretion, and the articulation of reasons capable of justifying the outcome. In this sense, the debate on the "robot judge" concerns far more than the possibility of increasing institutional efficiency. It concerns the very nature of adjudication and whether algorithmic systems can be reconciled with the normative, moral, and human dimensions of justice.

The term "robot judge" itself is not univocal. It may refer to a fully automated system that independently renders judicial decisions; it may describe algorithmic systems that support judges in analysis and reasoning; or it may function as a broader metaphor for the increasing automation of judicial processes. This conceptual ambiguity makes careful legal analysis particularly necessary. It is essential to distinguish between administrative automation, algorithmic decision-support, and autonomous adjudication, as each of these models raises different legal, ethical, and institutional concerns. The central issue is therefore not simply whether technology can be introduced into the judicial sphere, but under what conditions such use remains compatible with the fundamental principles of justice.

This article aims to examine the concept of the "robot judge" and to assess the extent to which AI may be integrated into judicial decision-making without undermining the foundational values of the legal order. More specifically, the article seeks, first, to identify the

potential advantages of AI in the administration of justice and, second, to determine the legal and ethical limits that must constrain its use. The article also addresses whether AI may realistically be viewed as a substitute for the human judge or whether it should instead be understood solely as a supportive tool operating under meaningful human control.

The research is guided by several key questions. Can artificial intelligence partially or fully perform judicial functions? What legal, ethical, and human rights risks accompany the use of AI in judicial decision-making? How does the increasing reliance on algorithmic systems affect judicial discretion, independence, and the requirement that decisions be reasoned and reviewable? Finally, what model of AI integration can be regarded as normatively acceptable in contemporary justice systems? These questions are of particular importance because the introduction of AI into adjudication cannot be evaluated solely in terms of efficiency or innovation; it must also be assessed against the standards of fair trial, accountability, transparency, equality, and human dignity.

Methodologically, the article is based on doctrinal legal analysis, comparative legal research, and a human-rights-oriented approach. It examines the theoretical foundations of artificial intelligence and the "robot judge", analyzes current forms of AI use in judicial systems, and considers relevant comparative practices. At the same time, it evaluates the principal risks associated with algorithmic bias, opacity, limited explainability, accountability deficits, and possible interference with fair trial guarantees. Attention is devoted to judicial discretion, since legal reasoning is not merely a formal or technical exercise but also a context-sensitive and value-laden process that cannot easily be translated into algorithmic logic.

The central argument of the article is that artificial intelligence may serve as a valuable auxiliary instrument in the administration of justice, but it should not replace the human judge as the final bearer of judicial authority. While AI may improve efficiency, consistency, and the management of judicial workloads, adjudication remains a fundamentally human responsibility. It requires interpretation, proportionality assessment, moral judgment, responsibility, and the capacity to provide reasons in a manner that is intelligible and legitimate for the parties and for society. Accordingly, the "robot judge" should be approached not as an inevitable endpoint of technological development, but as a legal and ethical challenge that demands careful normative boundaries.

The structure of the article reflects this objective. It first outlines the theoretical foundations of artificial intelligence and the concept of the "robot judge". It then examines existing forms of AI use in judicial practice and the potential advantages associated with such technologies. The following sections analyze the principal legal, ethical, and human rights risks, with separate attention devoted to the relationship between AI and judicial discretion. Finally, the article considers possible future models of AI integration in justice and proposes recommendations for legal policy. In doing so, it argues that technological innovation in the judicial sphere is acceptable only where it remains subject to human oversight, clear legal safeguards, and rights-based limitations.

METHODOLOGY

This article employs a doctrinal legal method as its primary research approach, supplemented by a comparative legal analysis and a human-rights-oriented analytical framework. The doctrinal method is used to examine the concept of the "robot judge" through the interpretation of legal principles, scholarly literature, and normative standards relevant to judicial decision-making, fairness, accountability, and the rule of law. This method was selected because the subject of the study is fundamentally normative in nature and requires an assessment of whether the use of artificial intelligence in adjudication is compatible with the core principles of justice.

In addition, the article applies a comparative approach to review how different jurisdictions and legal systems address the use of artificial intelligence in courts. Comparative analysis makes it possible to identify common tendencies, regulatory differences, and emerging models of technological integration in judicial practice. This method was chosen because the issue of AI in justice is developing unevenly across countries, and a comparative perspective helps to evaluate both practical experiences and normative responses.

The article also adopts a human-rights-based analytical perspective, particularly in relation to the right to a fair trial, judicial independence, equality, transparency, and data protection. This approach is necessary because the use of AI in judicial decision-making cannot be assessed solely from the standpoint of efficiency; it must also be examined considering fundamental rights and procedural guarantees.

The combination of these methods supports the aims of the research by enabling a structured evaluation of the legal nature, practical implications, and normative limits of artificial intelligence in the administration of justice.

Theoretical Foundations of Artificial Intelligence and the Concept of the "Robot Judge"

There is still no single and universally accepted definition of artificial intelligence; however, in contemporary scholarly and institutional discourse, AI is generally understood as a machine-based system capable of generating predictions, recommendations, content, or decisions on the basis of input data in ways that affect real or virtual environments.[1] This understanding makes clear that AI is not a single technology, but rather an umbrella concept that encompasses different methods, models, and functional capacities whose common feature is the ability to process information in a manner that, at least partially, resembles human intellectual activity. For this reason, any discussion of AI in the judicial sphere must be based not only on a technical understanding of the technology but also on a functional analysis of the role that the system plays in the decision-making process and the extent of its autonomy. This understanding makes clear that AI is not a single technology, but rather an umbrella concept that encompasses different methods, models, and functional capacities whose common feature is the ability to process information in a manner that, at least partially, resembles human intellectual activity. For this reason, any discussion of AI in the judicial sphere must be based not only on a technical understanding of the technology but also on a functional analysis of the role that the system plays in the decision-making process and the extent of its autonomy.[2] One of the most important branches of artificial intelligence is machine learning, which refers to the development and use of computer systems that adapt and learn from data with the goal of improving accuracy.[3] Unlike traditional programming, where a machine follows a fixed set of explicitly predefined instructions, machine learning systems detect patterns in data and build models that allow them to generate predictions or assessments. At the current stage of technological development, generative AI has also become especially significant. According to NIST, generative AI refers to a class of AI models that emulate the structure and characteristics of input data in order to generate synthetic content, including text, images, audio, video, and other forms of digital material. This category is particularly relevant for judicial settings, because it is capable not only of classification or prediction, but also of simulating legal reasoning, drafting, and justification.[4]

1 OECD. (2024). Explanatory memorandum on the updated OECD definition of an AI system. OECD Artificial Intelligence Papers, No. 8. OECD Publishing.

2 Ibid.

3 National Institute of Standards and Technology. (n.d.). Machine learning. NIST Computer Security Resource Center Glossary.

4 Ibid.

At the same time, it is essential to distinguish between automation and intelligent decision support. Automation usually concerns the execution of predefined, repetitive, and technical tasks, such as the registration of cases, document sorting, or the management of procedural deadlines. Intelligent decision support, by contrast, is a more complex category: the system processes data, identifies patterns, produces recommendations, and may influence the reasoning of the decision-maker. The key difference lies in the fact that, in the first case, technology replaces only an administrative or procedural action, whereas in the second case, it touches upon the substantive core of legal reasoning itself. For that reason, when AI is introduced into judicial systems, the crucial question is whether the system is merely a technical tool or whether it affects the normative content of adjudication.[5]

The term "robot judge" is not univocal, and its meaning depends on the degree of technological involvement that a particular author, policymaker, or legal system has in mind. In a broad sense, it may refer to any model in which artificial intelligence participates in judicial activity. In a narrower sense, it denotes a system that renders a legally significant decision with little or no human intervention. In legal scholarship, the expression "robot judge" is often used as an analytical concept through which one may assess both the feasibility and the legitimacy of transferring judicial functions to technology.[6] Thus, the term is more than a technical description; it reflects a deeper debate about the relationship between human judgment and algorithmic governance.

From a theoretical perspective, several models of the "robot judge" may be identified. The first is fully automated adjudication, in which a system independently processes facts, links them to relevant legal norms, and produces a final decision. This is the most radical model, because it effectively transfers the judicial function to technology. The second model is partially automated decision support, where AI analyses case materials, offers risk assessments, predicts possible outcomes, or drafts preliminary reasoning, while the final decision still remains in the hands of a human judge. The third, more moderate, model is AI as an auxiliary judicial tool, where technology is used for legal research, the identification of precedents, document organization, or administrative support, without directly exercising normative judgment.[7] Much of the confusion surrounding the notion of the "robot judge" stems from a failure to distinguish clearly among these different levels of technological involvement.

Contemporary European approaches have been particularly clear in stressing that AI in judicial systems should remain a tool "under user control" and should not become a prescriptive mechanism that effectively takes the place of the judge.[8] This position is grounded in the recognition that adjudication cannot be reduced to a purely computational exercise. For this reason, the most realistic contemporary understanding of the "robot judge" does not involve the complete replacement of the human judge, but rather a hybrid model in which AI performs analytical and organizational functions, while legal authority and responsibility remain with the human decision-maker.

The role of the human judge extends well beyond the mechanical application of legal rules to facts. Judicial decision-making requires not only the identification of relevant norms, but also their interpretation, the balancing of competing principles, the individualized as-

5 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

6 Morison, J., Harkens, A. (2019). Re-engineering justice? Robot judges, computerised courts and (semi) automated legal decision-making. Legal Studies, 39(4), 618–635. DOI:10.1017/lst.2019.5.

7 Fortes, P. R. B. (2020). Paths to digital justice: Judicial robots, algorithmic decision-making, and due process. Asian Journal of Law and Society. DOI:10.1017/als.2020.12.

8 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

sessment of circumstances, the application of proportionality, and the provision of reasons in a manner that is intelligible and legitimate to the parties and to society.[9] It is precisely here that a fundamental distinction emerges between human reasoning and algorithmic calculation. Algorithms may be highly effective at identifying patterns and correlations, yet legal judgment often depends on normative evaluation, contextual sensitivity, and responsibility in ways that exceed statistical inference.

A central element of adjudication is judicial discretion. Discretion does not mean arbitrariness; rather, it refers to the legally bounded capacity to choose among permissible alternatives in light of the specific circumstances of the case. Judges therefore evaluate elements that are difficult to fully formalize: the conduct of the parties, the singularity of factual situations, the proportionality of consequences, broader social implications, and, at times, moral intuition. By contrast, algorithmic systems operate within the parameters of the data they are given, the variables selected by designers, and the structure of the model itself. As a result, their ability to appreciate context in a deep and normatively meaningful way remains limited.[10] For this reason, scholarship increasingly emphasizes that algorithmic systems may assist judges, but they cannot easily replace the discretionary and responsibility-laden role of the human judge.[11]

Moreover, the human judge acts not only as an interpreter of rules, but also as a public authority whose decision must be perceived as fair. In this sense, the legitimacy of adjudication depends not only on the outcome, but also on the process: the opportunity to be heard, the careful consideration of individual circumstances, the reasoning provided, and the perception that the case has been examined by a human decision-maker rather than merely processed by a computational system. Empirical research further suggests that attitudes toward algorithmic involvement in courts vary significantly depending on the stage at which automation is introduced: automation is generally perceived as more acceptable in information acquisition and analytical support than in the final stages of decision selection or implementation.[12] In this respect, the human judge and the algorithmic system should not be understood as fully interchangeable actors. A more accurate view is that they are fundamentally different in nature and function: the latter may support the former, but cannot fully substitute for it.[13]

Accordingly, at the theoretical level, the concept of the "robot judge" demonstrates that the problem is not limited to the speed or technical accuracy of artificial intelligence. The deeper issue is whether core elements of adjudication–discretion, the perception of justice, moral judgment, contextual reasoning, and accountable justification–can truly be translated into algorithmic form. The answer to this question ultimately determines whether AI in the judicial sphere should remain a supportive instrument or whether it could one day challenge the human judge as the author of legal decisions.[14]

Existing Forms of the Use of Artificial Intelligence in the Administration of Justice

The current use of artificial intelligence in judicial systems is neither purely hypothetical nor limited to futuristic experimentation. Contemporary practice shows that AI is already

9 Fortes, P. R. B. (2020). Paths to digital justice: Judicial robots, algorithmic decision-making, and due process. Asian Journal of Law and Society. DOI:10.1017/als.2020.12.

10 Morison, J., Harkens, A. (2019). Re-engineering justice? Robot judges, computerized courts and (semi) automated legal decision-making. Legal Studies, 39(4), 618–635. DOI:10.1017/lst.2019.5.

11 Barysė, D., Sarel, R. (2023). Algorithms in the court: Does it matter which part of the judicial decision-making is automated? Artificial Intelligence and Law, 32(1). DOI:10.1007/s10506-022-09343-6.

12 Ibid.

13 de la Osa, D. U. S., Remolina, N. (2024). Artificial intelligence at the bench: Legal and ethical challenges of informing–or misinforming–judicial decision-making through generative AI. Data & Policy, 6, e59. DOI:10.1017/dap.2024.53.

14 Ibid.

being integrated into courts through a wide variety of tools designed to improve efficiency, accessibility, and the management of growing caseloads. According to the first annual report of the CEPEJ Resource Centre on Cyberjustice and Artificial Intelligence, by the end of 2024, at least 125 cyberjustice tools had been identified, with systems based especially on machine learning and natural language processing becoming increasingly important in courts.[15] These tools are used not only for administrative purposes, but also for tasks that come closer to legal reasoning, such as analyzing case materials, extracting relevant information, generating summaries, identifying legal issues, and supporting the preparation of judicial work.[16] At the same time, the same report emphasizes that no fully autonomous "robot justice" currently exists in actual court practice and that the most advanced systems remain supportive rather than substitutive.[17]

In practical terms, one of the most widespread areas of AI use concerns case management and document processing. Courts and judicial administrations increasingly employ AI-enabled systems to classify incoming materials,[18] extract metadata, anonymize judgments, transcribe hearings, translate texts, and summarize large volumes of legal documents.[19] The OECD has documented, for example, that Spain has developed in-house NLP and generative AI tools to classify, analyze, summarize, and anonymize court-related texts, while also supporting document retrieval and workflow management within the justice system.[20] Such systems do not decide cases themselves, but they substantially reduce the time required for repetitive and information-intensive tasks. AI is also being used in legal research, precedent retrieval, and the identification of relevant norms or comparable decisions. In this respect, modern judicial AI often operates as an advanced research and knowledge-management tool, enabling judges and court staff to navigate complex legal material more quickly and systematically.[21]

A more controversial field of application concerns risk assessment instruments and sentencing prediction models, especially in criminal justice. In the United States, algorithmic tools such as COMPAS have been used to support decisions relating to bail, sentencing, and parole by estimating the likelihood of recidivism.[22] The well-known case of State v. Loomis illustrates this development: the Wisconsin Supreme Court accepted the use of COMPAS as a sentencing support tool, but made clear that such an assessment could not be the determinative factor and had to be treated with caution.[23] More broadly, these tools do not generate a sentence in a legally autonomous sense; rather, they offer probabilistic assessments meant to inform judicial discretion. Even where predictive systems are used, they remain embedded within a human decision-making process, precisely because criminal adjudication involves constitutional guarantees, individualized assessment, and responsibility that cannot be delegated entirely to an opaque model.[24]

The United States offers one of the clearest examples of selective and function-specific use of AI in judicial settings. Algorithmic tools have been most visibly used in criminal justice, especially for recidivism and risk assessment, while more recent developments concern generative AI in research, drafting, and court ad-

15 European Commission for the Efficiency of Justice. (2025). 1st report on the use of artificial intelligence (AI) in the judiciary, based on the information contained in the CEPEJ's Resource Centre on Cyberjustice and AI. Council of Europe.
16 Ibid.
17 Ibid.
18 Ibid.
19 Organisation for Economic Co-operation and Development. (2025). AI in justice administration and access to justice. In Governing with artificial intelligence: The state of play and way forward in core government functions. OECD Publishing.
20 Ibid.
21 National Center for State Courts. (2026). Guidance for implementing AI in courts.
22 State v. Loomis, 881 N.W.2d 749 (Wis. 2016).
23 Ibid.
24 Baker, J., Hobart, L., Mittelsteadt, M. (2023). An introduction to artificial intelligence for federal judges. Federal Judicial Center.

ministration.[25] At the institutional level, the U.S. judiciary has taken a cautious but practical approach. The Federal Judicial Center has issued guidance for federal judges explaining how AI may be used in the judicial process and what legal questions arise from its use.[26] In parallel, the National Center for State Courts reports that more than 50 courts are actively testing AI tools for legal research, document review, and case management, while also urging courts to begin with low-risk tasks and to establish governance safeguards.[27] Chief Justice John Roberts likewise recognized in his 2023 Year-End Report that many AI applications can assist courts in achieving "just, speedy, and inexpensive" resolutions, while stressing that judicial work still includes quintessentially human functions that AI can inform but not perform on its own.[28] China represents a broader and more ambitious model of judicial digitalization. The Chinese "smart court" reform integrates big data, algorithmic tools, online proceedings, and AI-assisted functions into a wider platform of judicial informatization.[29] Scholarly analyses show that Chinese courts use such systems for case management, online filing, evidence exchange, document service, workflow coordination, and analytical support for judges.[30] More recent official materials from the Supreme People's Court describe AI-generated platforms designed to help judges search legal materials, compare electronic files, extract key points, and reduce the burden of handling rising numbers of cases.[31] Although this model goes further than most Western systems in the breadth of digitization, even there, the language used by official institutions presents AI primarily as a "legal assistant" that enhances efficiency rather than as a fully independent judge.[32] At the same time, the Chinese experience has generated significant debate concerning oversight, surveillance, judicial autonomy, and the relationship between technology and political control.[33] The case of Estonia is especially important because it is often surrounded by misinformation in public debate. Estonia has frequently been cited as a country developing a "robot judge", yet the Estonian Ministry of Justice publicly clarified in 2022 that it was not developing an AI judge for small claims or general court procedures to replace human judges.[34] Instead, Estonia has focused on optimization, automation of procedural steps, and other ICT tools intended to reduce administrative burdens.[35] Academic writing confirms that Estonia has long used semi-automatic procedures in certain simplified processes, such as payment-order procedures, and that its judiciary uses AI-related tools in support functions within the e-filing and court information systems, but not for autonomous judicial decision-making.[36] Thus, the Estonian experience is better understood as an example of digital procedural support rather than genuine machine adjudication.[37]

Within the **European Union**, the prevailing approach is normative caution combined with controlled experimentation. At the policy level, the Council of Europe's CEPEJ Ethical Charter has long insisted that AI in justice must remain consistent with fundamental rights, transparency, non-discrimination, and user control.[38]

25 State v. Loomis, 881 N.W.2d 749 (Wis. 2016).
26 Baker, J., Hobart, L., Mittelsteadt, M. (2023). An introduction to artificial intelligence for federal judges. Federal Judicial Center.
27 National Center for State Courts. (2026). Guidance for implementing AI in courts.
28 Roberts, J. G., Jr. (2023). 2023 Year-End Report on the Federal Judiciary. Supreme Court of the United States.
29 Reiling, A. D., Papagianneas, S. (2025). Lessons from China's smart court reform? International Journal for Court Administration, 16(1).
30 Ibid.
31 Supreme People's Court of the People's Republic of China. (2024). SPC launches AI-generated platform to help judges, public.
32 Ibid.
33 Reiling, A. D., Papagianneas, S. (2025). Lessons from China's smart court reform? International Journal for Court Administration, 16(1).
34 Ministry of Justice and Digital Affairs of Estonia. (2022). Estonia does not develop AI Judge.
35 Ibid.
36 Härmand, K. (2023). AI systems' impact on the recognition of foreign judgements: The case of Estonia. Juridica International, 32, 107–118.
37 Ibid.
38 European Commission for the Efficiency of Justice.

This orientation has been reinforced by the EU AI Act. Regulation (EU) 2024/1689 treats certain AI systems used in the administration of justice as **high-risk**, including systems intended to assist judicial authorities in researching and interpreting facts and the law and in applying the law to concrete facts.[39] Recital 61 of the Act expressly links such systems to potentially significant effects on the rule of law, the right to an effective remedy, and the right to a fair trial.[40] The European model, therefore, does not prohibit the use of AI in courts as such, but it subjects judicial AI to heightened safeguards and signals that systems operating in this field must remain tightly controlled and reviewable.

A comparative assessment of current practice shows that AI is used in courts predominantly as a decision-support tool rather than as a final and autonomous decision-maker. The CEPEJ's 2025 report is explicit on this point: according to the information currently available, there are no fully automated AI systems functioning entirely independently in courts, and the idea of replacing judges with machines is not supported by the evidence gathered in the Resource Centre.[41] The same report concludes that AI should serve as an assistant rather than a replacement and that judges must retain their own judgment throughout the process.[42] This finding is highly significant because it demonstrates that actual institutional practice remains far more cautious than some public narratives about "robot judges" might suggest. The reasons for this restraint are structural rather than merely technological. Judicial authority is inseparable from responsibility, reason-giving, procedural fairness, and the protection of rights. Even where AI can classify cases, summarize documents, retrieve precedents, or provide predictive assessments, final adjudication still requires interpretation, contextual judgment, and legal accountability. This is why, in practice, courts and regulators tend to accept AI for low-risk and preparatory functions, while resisting its use as a substitute for judicial authority.[43] The U.S. judiciary's own reflections emphasize that AI may support judges, but cannot itself perform those "quintessentially human functions" that arise in fact-sensitive and discretionary adjudication.[44] Similarly, the EU regulatory approach classifies judicial AI as high-risk precisely because of its possible effects on fair trial rights and the rule of law.[45] Accordingly, the dominant contemporary model is not that of automated justice, but of augmented adjudication: AI may assist, inform, and streamline, yet the final decision remains the responsibility of a human judge.

Possible Advantages of the Robot Judge

One of the most frequently cited advantages of artificial intelligence in the administration of justice is its potential to improve efficiency and procedural speed. Judicial systems in many countries face chronic delays, heavy caseloads, and administrative congestion, which undermine the timely delivery of justice. In this context, AI-based tools may assist courts by accelerating repetitive and information-intensive tasks, including

(2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

39 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). Official Journal of the European Union, L, 2024/1689.

40 Ibid.

41 European Commission for the Efficiency of Justice. (2025). 1st report on the use of artificial intelligence (AI) in the judiciary, based on the information contained in the CEPEJ's Resource Centre on Cyberjustice and AI. Council of Europe.

42 Ibid.

43 Roberts, J. G., Jr. (2023). 2023 Year-End Report on the Federal Judiciary. Supreme Court of the United States.

44 Baker, J., Hobart, L., & Mittelsteadt, M. (2023). An introduction to artificial intelligence for federal judges. Federal Judicial Center.

45 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). Official Journal of the European Union, L, 2024/1689.

case registration, document classification, anonymization of judgments, transcription, summarization, and the preparation of draft materials.[46] The CEPEJ has reported that, by early 2025, 125 AI-related tools had already been identified in its Resource Centre on Cyberjustice and AI, many of them expressly aimed at improving judicial efficiency and accessibility.[47] Likewise, the OECD notes that AI applications in justice range from automating routine case-management functions to supporting legal research and predictive analytics, thereby reducing the time spent on tasks that would otherwise consume substantial judicial and administrative resources.[48] The practical implications of such use are significant. Where courts are burdened by large numbers of routine filings and document-heavy proceedings, AI systems can shorten processing time and relieve court personnel of manual tasks. OECD examples show that AI-assisted tools are already being used to automate anonymization, assist in legal research, and generate standardized summaries, thereby streamlining workflows within judicial institutions.[49] Particularly illustrative is the Peruvian "Amauta Pro" system, which, according to the OECD, reduced the time needed to draft protective resolutions in cases of violence from approximately three hours to forty seconds.[50] Although such examples do not imply that AI replaces adjudication itself, they do suggest that AI may contribute to reducing backlogs indirectly by freeing judges and clerks to focus on the substantive and discretionary dimensions of cases. In this respect, the appeal of the "robot judge" lies not only in the prospect of faster decisions, but also in the redistribution of institutional effort within the court system.[51]

A second important advantage commonly associated with AI in justice is its capacity to support greater consistency and predictability in the treatment of similar cases. In legal systems committed to equality before the law and legal certainty, significant divergences in judicial outcomes may undermine trust in courts and make litigation outcomes harder to foresee.[52] AI tools trained on large corpora of case law may assist judges and legal professionals in identifying patterns, locating comparable precedents, and highlighting the range of outcomes that have historically been adopted in similar factual and legal situations.[53] From this perspective, algorithmic support is often presented as a means of strengthening coherence in judicial practice rather than replacing individualized adjudication. The potential value of such consistency should not be overstated, but it is nevertheless important. The OECD's justice overview explicitly states that AI can support justice systems by improving consistency, efficiency, and accessibility.[54] In a similar vein, the CEPEJ Ethical Charter recognizes that the use of AI in justice may contribute to the efficiency and quality of judicial systems, provided that it remains compatible with fundamental rights.[55] Scholarly analysis has also linked predictive and analytical tools to the broader objectives of foreseeability, legal certainty, and equality in adjudication, especially in areas where courts decide large numbers of structurally similar cases.[56] Used careful-

46 Organisation for Economic Co-operation and Development. (2025). AI in justice administration and access to justice. In Governing with artificial intelligence: The state of play and way forward in core government functions. OECD Publishing.

47 Ibid.

48 Ibid.

49 Ibid.

50 Ibid.

51 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

52 OECD.AI. (n.d.). AI in government: Issues – Justice. OECD.

53 Donati, F. (2025). The use of artificial intelligence in judicial systems: Ethics and efficiency. In Artificial intelligence, judicial decision-making and fundamental rights (JuLIA Handbook). Scuola Superiore della Magistratura.

54 OECD.AI. (n.d.). AI in government: Issues – Justice. OECD.

55 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

56 Donati, F. (2025). The use of artificial intelligence in judicial systems: Ethics and efficiency. In Artificial intelligence, judicial decision-making and fundamental rights (JuLIA Handbook). Scuola Superiore della Mag-

ly, AI may therefore help reduce unjustified fragmentation in case law, encourage more uniform judicial practice, and offer judges a clearer map of existing legal tendencies. At the same time, this advantage is best understood as an aid to coherence rather than as a promise of mechanical uniformity, since justice still requires sensitivity to the facts and circumstances of each case.[57]

A further advantage of AI lies in its capacity to process and analyze large volumes of legal and factual data at a speed impossible for human actors alone. Courts operate in an environment saturated with legislation, case law, procedural records, expert reports, and evidentiary materials. AI systems–especially those based on natural language processing and machine learning–can assist by searching across massive datasets, detecting patterns, cross-referencing authorities, extracting relevant information, and generating structured reports on specific issues.[58] The CEPEJ's 2025 reflections note that some AI systems can cross-reference large amounts of data and provide reports on particular points, which can be useful for analyzing case documents and facts as part of preparatory assistance.[59] This kind of analytical support is especially valuable in complex litigation, repetitive claims, and areas of law characterized by extensive case-law development. The significance of this advantage is not limited to speed alone. Large-scale analysis can also improve the informational quality of judicial work. AI tools may help judges and court staff discover tendencies that are difficult to identify manually, such as recurring procedural bottlenecks, statistically unusual outcomes, patterns in case duration, or clusters of similar claims. In legal research and case preparation, this may enhance the capacity of judicial actors to navigate precedent, compare decisions, and identify relevant normative material more comprehensively.[60] In this sense, the "robot judge" is often attractive not because it promises autonomous legal wisdom, but because it appears capable of augmenting the cognitive reach of human decision-makers. The ability to process large datasets rapidly and systematically is therefore one of the clearest functional advantages of AI in judicial settings, even when final legal evaluation remains entirely human.[61]

AI is also frequently associated with the possibility of improving access to justice, particularly for individuals facing barriers related to cost, complexity, distance, and procedural opacity. Digital tools, including chatbots, virtual assistants, automated triage systems, and online dispute resolution platforms, may help users understand procedures, identify relevant legal pathways, and obtain timely information without the need for immediate in-person legal assistance.[62] The OECD emphasizes that digital technologies and data have considerable potential to support access to justice, resilience, efficiency, and fairness, while its Online Dispute Resolution Framework stresses that ODR can significantly enhance access to justice by improving affordability, reducing the need to travel, and enabling more effective and timely dispute resolution.[63] These developments are especially relevant for low-value, repetitive, or standardized disputes, where traditional court processes may be too expensive or cumbersome in relation to the amount at stake.

istratura.

57 Ibid.

58 European Commission for the Efficiency of Justice. (2025). 1st report on the use of artificial intelligence (AI) in the judiciary, based on the information contained in the CEPEJ's Resource Centre on Cyberjustice and AI. Council of Europe.

59 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

60 Ibid.

61 Organisation for Economic Co-operation and Development. (2025). AI in justice administration and access to justice. In Governing with artificial intelligence: The state of play and way forward in core government functions. OECD Publishing.

62 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

63 Organisation for Economic Co-operation and Development. (2024). OECD online dispute resolution framework. OECD Publishing.

Examples identified by the OECD and the NCSC illustrate how digital and AI-supported justice services can make justice pathways more user-friendly. In Portugal, an AI-powered chatbot has been used to provide accessible guidance and practical information to the public about justice-related matters.[64] The NCSC similarly highlights the use of triage tools to improve civil justice accessibility and to expedite certain categories of proceedings.[65] More broadly, the prospect of a digital court or AI-supported court ecosystem suggests a model in which certain disputes–especially small claims, consumer conflicts, or administrative matters–could be handled more quickly and more conveniently through online interfaces, supported by automated information tools and structured digital workflows.[66] While such developments do not eliminate the need for human adjudication, they strengthen the argument that AI, when used responsibly, may contribute to making justice systems more accessible, people-centered, and responsive to modern social needs.[67]

Taken together, these advantages explain why artificial intelligence has attracted serious institutional attention in the judicial sphere. AI promises not only procedural acceleration, but also better information management, greater regularity in judicial practice, and new pathways for access to justice. Yet these benefits are strongest when AI is used as a supportive infrastructure rather than as an autonomous adjudicator.[68] The very features that make the "robot judge" attractive–speed, scale, standardization, and digital accessibility–also reveal that its most realistic contribution lies in strengthening the functioning of human-centered justice, not in displacing the human judge.[69]

Artificial Intelligence and Judicial Discretion

Any discussion of artificial intelligence in adjudication must begin with the principle of judicial independence, which is a prerequisite for the rule of law and a fundamental guarantee of a fair trial.[70] Judicial independence has both an institutional and an individual dimension: courts must be free from improper external influence, and judges must also be able to decide cases according to their own assessment of the facts and the law, without pressure from internal hierarchies, political actors, or technological systems.[71,72] In this respect, the growing use of AI in courts raises a new question: can algorithmic recommendations subtly constrain the judge's freedom of judgment, even when the final decision is formally taken by a human being? This concern is particularly relevant where AI tools are presented as highly accurate, neutral, or efficient, because such framing may create pressure to follow machine-generated outcomes rather than to exercise genuine in-

64 Organisation for Economic Co-operation and Development. (2025). AI in justice administration and access to justice. In Governing with artificial intelligence: The state of play and way forward in core government functions. OECD Publishing.

65 National Center for State Courts. (2026). Guidance for implementing AI in courts.

66 Organisation for Economic Co-operation and Development. (2024). OECD online dispute resolution framework. OECD Publishing.

67 National Center for State Courts. (2026). Guidance for implementing AI in courts.

68 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

69 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

70 United Nations Office on Drugs and Crime. (2002/2006). The Bangalore Principles of Judicial Conduct. UNODC.

71 Ibid.

72 Council of Europe, Committee of Ministers. (2010). Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.

dependent reasoning.[73,74,75]

Judicial independence is therefore closely linked to inner conviction and discretionary authority. A judge does not merely apply predetermined instructions; rather, adjudication requires a reasoned personal evaluation of the case within the bounds of law. If AI is allowed to shape the outcome too strongly, the danger is not only technical dependence but also a gradual erosion of judicial autonomy. For this reason, contemporary European guidance emphasizes that AI in justice must remain under user control and must not replace the judge's own responsibility for legal assessment.[76,77]

Artificial intelligence can undoubtedly assist with the reading of legal texts, the retrieval of case law, and the identification of patterns across large volumes of legal material. It can also support judges by summarizing arguments, comparing precedents, or highlighting relevant factors in similar disputes.[78,79] Yet the central issue is whether AI can move beyond information processing and perform genuine legal evaluation. Legal judgment is not exhausted by locating the applicable norm. It also requires interpretation, the reconciliation of competing principles, the assessment of proportionality, and the justification of why one solution is more consistent with justice than another. These tasks are not purely computational; they involve normative reasoning and context-sensitive judgment.[80]

This limitation becomes especially visible in hard cases. The interpretation of open-textured legal standards, the balancing of rights and public interests, and the application of proportionality tests require more than prediction based on past data. They require legal reasoning that is sensitive to the singularity of the dispute and to the normative meaning of the law in context. Current policy and scholarly analysis, therefore, treat AI as a support mechanism for reasoning rather than as an autonomous bearer of legal judgment.[81,82,83]

The limits of AI in adjudication reflect a deeper theoretical point: law is not only a system of rules, but also a practice of value-based judgment. Legal reasoning is not reducible to formal logic alone. Judicial decisions often involve fairness, equity, proportionality, social consequences, and the moral significance of the facts. Even when the legal rule appears clear, its application frequently depends on interpretation and on the weighing of values that cannot be fully translated into code or statistically inferred from prior cases.[84]

Accordingly, the role of the judge goes beyond the mere processing of information. The judge acts as a public authority who must give reasons, assume responsibility, and produce a

73 United Nations Office on Drugs and Crime. (2002/2006). The Bangalore Principles of Judicial Conduct. UNODC.

74 Council of Europe, Committee of Ministers. (2010). Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities.

75 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

76 Ibid.

77 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

78 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

79 de la Osa, D. U. S., Remolina, N. (2024). Artificial intelligence at the bench: Legal and ethical challenges of informing–or misinforming–judicial decision-making through generative AI. Data & Policy, 6, e59. DOI:10.1017/dap.2024.53.

80 Ibid.

81 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

82 de la Osa, D. U. S., Remolina, N. (2024). Artificial intelligence at the bench: Legal and ethical challenges of informing–or misinforming–judicial decision-making through generative AI. Data & Policy, 6, e59. DOI:10.1017/dap.2024.53.

83 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

84 de la Osa, D. U. S., Remolina, N. (2024). Artificial intelligence at the bench: Legal and ethical challenges of informing–or misinforming–judicial decision-making through generative AI. Data & Policy, 6, e59. DOI:10.1017/dap.2024.53.

decision that can be accepted as legitimate by the parties and by society. This human dimension of adjudication explains why the concept of the "robot judge" remains problematic at the level of final decision-making. AI may strengthen judicial work, but it cannot fully replicate the normative responsibility that lies at the heart of judging.[85,86,87]

Human Rights Perspective

The use of AI in courts must be assessed through the lens of the right to a fair trial. Article 6 of the European Convention on Human Rights guarantees a hearing by an independent and impartial tribunal established by law, together with core elements of due process such as reasoned adjudication and procedural fairness.[88] In the context of judicial AI, these guarantees raise immediate concerns. If an algorithm influences the resolution of a dispute, the parties must still be able to understand how the outcome was reached, challenge the basis of the decision, and have their arguments genuinely considered by a tribunal that remains independent in substance, not only in form. The EU AI Act reflects the gravity of this issue by classifying certain AI systems used in the administration of justice as high-risk, precisely because of their potentially significant impact on the rule of law, the right to an effective remedy, and the right to a fair trial.[89]

The fair trial dimension also includes the requirement of reviewability. Even where AI is used only in support of a judicial decision, the result must remain open to meaningful human reconsideration and, where applicable, appeal. A system that produces opaque or effectively unchallengeable outcomes would be difficult to reconcile with procedural justice. For that reason, judicial AI cannot be acceptable unless it preserves the parties' ability to contest the reasoning, the data, and the relevance of machine-generated outputs.[90,91,92]

AI systems often depend on the processing of large volumes of data, including personal and sometimes highly sensitive information. In judicial settings, this may involve criminal history, financial status, health-related material, family circumstances, or behavioral indicators. This makes privacy and data protection central concerns. Council of Europe Convention 108+ applies to automated processing of personal data, while the Council of Europe's AI and data protection guidelines stress that human dignity and fundamental rights must remain central in AI deployment.[93] In the EU context, GDPR Article 22 provides that a person has the right not to be subject to a decision based solely on automated processing that produces legal or similarly significant effects, and accompanying guidance stresses safeguards such as meaningful information, contestability, and human intervention.[94]

85 United Nations Office on Drugs and Crime. (2002/2006). The Bangalore Principles of Judicial Conduct. UNODC.

86 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

87 de la Osa, D. U. S., Remolina, N. (2024). Artificial intelligence at the bench: Legal and ethical challenges of informing–or misinforming–judicial decision-making through generative AI. Data & Policy, 6, e59. DOI:10.1017/dap.2024.53.

88 European Court of Human Rights. (2022). Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil and criminal limbs).

89 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

90 European Court of Human Rights. (2022). Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil and criminal limbs).

91 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

92 European Data Protection Board. (2018). Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679; European Union. (2016). Regulation (EU) 2016/679 (General Data Protection Regulation), Art. 22.

93 Council of Europe. (2018). Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+); Council of Europe. (2019). Guidelines on artificial intelligence and data protection.

94 European Data Protection Board. (2018). Guidelines

In the judicial sphere, the relevance of these safeguards is obvious. Where courts rely on AI tools trained on large datasets, questions arise about data minimization, security, accuracy, secondary use, and the risks created by the inclusion of sensitive personal information. These risks become even more serious when the data reflects structural social inequalities or historical over-policing, since such distortions may later influence judicial outcomes. Data protection is therefore not a peripheral issue in the debate on the robot judge; it is one of the legal foundations for limiting the use of automated decision-making in justice.[95,96]

The principle of equality before the law is directly implicated by algorithmic decision-making. AI systems learn from existing data, and where that data contains historical bias or structural inequalities, algorithmic outputs may reproduce or intensify discriminatory patterns. The CEPEJ Ethical Charter, therefore, places non-discrimination among the core principles governing the use of AI in judicial systems.[97] Likewise, the EU Agency for Fundamental Rights has warned that biased algorithms can reinforce or even create discrimination against certain groups.[98] These concerns are especially important for vulnerable groups, whose treatment in legal and administrative systems has often already been affected by social disadvantage, unequal surveillance, or discriminatory institutional practices.

In courts, unequal algorithmic impact may appear in multiple ways: through skewed risk scores, distorted predictive models, selective correlations, or the use of proxies that indirectly encode race, class, gender, disability, or other protected characteristics. The fact that an AI system appears neutral on its face does not remove this danger. On the contrary, the opacity and technical authority of algorithmic systems may make discriminatory effects harder to detect. For this reason, equality in the age of judicial AI requires not only formal neutrality but active monitoring, testing, and auditing for disparate impact.[99]

For all these reasons, human oversight has become a central principle in the governance of AI. Article 14 of the EU AI Act requires human oversight for high-risk systems, with the explicit aim of preventing or minimizing risks to health, safety, and fundamental rights.[6] In the justice context, this requirement has special significance: it means that a human actor must remain capable of understanding the system's role, identifying anomalies, disregarding inappropriate outputs, and taking responsibility for the final decision. The same logic is reflected in Council of Europe materials, which stress user control and caution against non-explainable AI influencing the judge's autonomy.[100]

The human-in-the-loop model is therefore not merely a technical preference but a rights-based necessity. It preserves accountability, protects judicial independence, and ensures that technology remains subordinate to law rather than the reverse. In the field of adjudication, meaningful human control is the minimum condition for reconciling innovation with fundamental rights protection.[101]

The most radical vision of the robot judge is the idea of full replacement: the automation of the judicial function itself. This theory assumes

on automated individual decision-making and profiling for the purposes of Regulation 2016/679; European Union. (2016). Regulation (EU) 2016/679 (General Data Protection Regulation), Art. 22.

95 Ibid.

96 Council of Europe. (2018). Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+); Council of Europe. (2019). Guidelines on artificial intelligence and data protection.

97 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

98 European Union Agency for Fundamental Rights. (2025). Fundamental Rights Report 2025. FRA.

99 Ibid.

100 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

101 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

that, at least in some categories of cases, adjudication could be reduced to the processing of facts and rules through a sufficiently advanced algorithm. Such a model is most often discussed in relation to small, standardized, and repetitive disputes, where legal rules are relatively clear and factual complexity is limited. In theory, certain procedural areas–such as payment orders, uncontested claims, or highly formalized low-value disputes–may appear more suitable for extensive automation than complex constitutional, criminal, or rights-sensitive litigation.[102]

Yet even in these domains, the idea of full replacement remains problematic. Current evidence does not show the existence of fully autonomous judicial AI operating independently in courts, and European guidance remains skeptical of such a model.[103] More importantly, even seemingly simple cases may raise issues of context, fairness, vulnerability, or procedural justice that resist purely automated treatment. Full replacement, therefore, remains more a theoretical provocation than a legally accepted model of justice.

A more realistic approach is the collaborative model, in which AI functions as a support system within a judge-led process. In this model, the relationship is not "judge or machine", but judge plus AI. The system may assist with research, pattern recognition, summarization, document management, or draft analysis, while the human judge retains interpretive and decision-making authority. This arrangement allows courts to benefit from technological speed and scale without abandoning the safeguards associated with human adjudication.[104]

The collaborative model also reduces risk through human control. It permits judicial scrutiny of algorithmic outputs, preserves reason-giving and accountability, and makes it easier to correct errors or reject inappropriate recommendations.[105] For these reasons, cooperation rather than substitution has become the dominant practical and normative direction in contemporary debates on AI in justice.[106]

From a normative standpoint, AI should not replace the judge. It may be used as a valuable supportive mechanism, but final judicial authority should remain with a human decision-maker. This position follows not only from technological caution, but from the nature of adjudication itself: judging requires discretion, interpretation, legitimacy, and responsibility in ways that cannot be fully transferred to an algorithm. The most legally acceptable model is therefore a human-centered and human-controlled framework, in which AI augments judicial work but does not determine the outcome.[107]

Recommendations for Legal Policy

Considering the above analysis, a prudent legal policy for AI in justice should include the following elements. First, states should adopt a clear legal framework defining which judicial functions may be supported by AI and which must remain exclusively human. Second, transparency standards should require disclosure of the role played by AI in judicial processes.[108] Third, systems used in courts should be subject to an explainability requirement, at least to

102 Ibid.

103 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

104 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

105 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

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108 Dolidze T. (2026) Integration of Artificial Intelligence in Criminal Investigation and Criminal Proceedings. Generis Publishing, 20-21.

the extent necessary for meaningful challenge and review. Fourth, human oversight must be mandatory wherever AI affects legally significant outcomes. Fifth, judicial AI should undergo regular audits for accuracy, robustness, and rights-related risks. Sixth, courts should implement anti-discrimination controls, including testing for biased data and disparate impact. Seventh, judicial institutions should adopt ethical guidelines for the responsible use of AI, consistent with fair trial and data protection standards. Finally, judges and legal professionals should receive training not only in the technical use of AI tools, but also in their legal limits and human rights implications.[109,110,111,112,113]

CONCLUSION

Artificial intelligence creates important opportunities for the administration of justice. It can improve efficiency, accelerate the handling of cases, support consistency, strengthen data analysis, and expand access to justice in certain categories of disputes.[114] At the same time, judicial decision-making is not merely a technical process. Justice requires fairness, explainability, accountability, equality, and respect for fundamental rights. It also requires a human judge capable of interpretation, discretion, and responsibility. For this reason, the concept of the "robot judge" should not be understood as a viable substitute for the human judge in the full sense of adjudication.[115]

The most realistic and legally acceptable model is therefore not replacement, but cooperation. AI may serve as a powerful auxiliary instrument within judicial systems, provided that its use is framed by clear law, effective oversight, procedural safeguards, and meaningful human control. Only under such conditions can technological innovation remain compatible with the rule of law and the protection of human dignity.

109 European Commission for the Efficiency of Justice. (2025). Reflections of the AIAB on the use of artificial intelligence in judicial systems. Council of Europe.

110 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

111 European Data Protection Board. (2018). Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679; European Union. (2016). Regulation (EU) 2016/679 (General Data Protection Regulation), Art. 22.

112 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

113 European Union Agency for Fundamental Rights. (2025). Fundamental Rights Report 2025. FRA

114 European Commission for the Efficiency of Justice. (2018). European ethical charter on the use of artificial intelligence in judicial systems and their environment. Council of Europe.

115 European Union. (2024). Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

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Epistemic-Justificatory Proof Theory and the Legitimacy of Judicial Decisions

Erwin Susilo

Ph.D Candidate in Law, Universitas Syiah Kuala,
Judge, Pangkalan Balai District Court (Class IB), Indonesia

Erwinowam@gmail.com

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ABSTRACT

A judge's decision plays a central role in the rule of law by establishing legal truth and legitimizing the state's coercive power. This role has become increasingly complex in contemporary adjudication, where courts confront scientific, statistical, and algorithmic evidence amid normative uncertainty and heightened human rights demands. This article examines legal interpretation and proof in judicial decisions as a process of epistemic justification rather than procedural compliance. Using a qualitative normative approach supported by conceptual–philosophical and limited comparative analysis, the study explores how judges construct claims of legal truth through evidentiary reasoning. A review of the literature shows that existing studies on proof remain fragmented—doctrinal, probabilistic, or technological—and lack an integrated epistemological framework capable of explaining the inferential transition from evidence to legal fact. This fragmentation risks reducing judicial legitimacy to formal compliance or subjective judicial belief. The article's primary contribution is the proposal of Epistemic-Justificatory Proof Theory, which defines proof as an epistemic practice that ne-

cessitates inferential transparency, rational coherence, and intersubjective testability. By integrating legal theory with the philosophy of science, this framework offers an evaluative model for assessing the legitimacy of judicial decisions and provides a normative response to the challenges of proof in contemporary justice systems.

INTRODUCTION

A judge's decision is a central instrument in a state of law because it serves to establish legal truth while also legitimizing the state's use of coercive power. The relevance of this study is increasingly strengthened in the context of modern justice, which is faced with the increasing complexity of evidence, ranging from scientific and statistical to algorithmic evidence, amidst the uncertainty of the meaning of legal norms and the demands for human rights protection. In such situations, interpretation and proof can no longer be understood as mere technical stages but rather as a crucial space where law is shaped through judicial reasoning.

The subject of this research is the interpretation of law and evidence in judicial decisions, understood as the process of simultaneously seeking and justifying legal truth. This research aims to analyze how judges construct truth claims through evidentiary reasoning and to formulate a conceptual framework capable of explaining these standards of truth legitimacy. Specifically, this article aims to shift the understanding of proof from mere procedural compliance toward an epistemic practice that demands rational, coherent, and intersubjectively accountable justification.

Several previous studies have examined the interpretation and rules of evidence from various perspectives. Hartanto and Hidayat determined that the implementation of the reverse burden of proof in drug money laundering cases was normatively suitable but not yet effective in significantly curtailing the crime.[1] These findings align with Morrison's critique of the vulnerability of subjective forensic practices to bias and the urgency of shifting to transparent and validated data-driven methods,[2] as well as Curley et al.'s demonstration that bias in jury decisions is multifaceted, interactive, and potentially disruptive to the rationality and fairness of verdicts.[3] On the other hand, Cui et al. assert that advancements in natural language processing and big data have significantly improved the prediction of legal decisions, although the human-machine performance gap persists.[4] Meanwhile, Sachoulidou warns that the use of AI in law enforcement creates serious tension between efficiency and human rights protection, necessitating special procedural safeguards, particularly transparency and clarity of reasoning.[5] Roberts asserts that the his-

1 Hartanto, D., Hidayat, N. (2021). Application of reverse evidence for the crime of money laundering based on the origin of narcotics. Croatian International Relations Review, 27(88), pp. 14–33. <https://doi.org/10.2478/CIRR-2021-0009>.

2 Morrison, G. S. (2022). Advancing a paradigm shift in evaluation of forensic evidence: The rise of forensic data science. Forensic Science International: Synergy, 4, 100270. <https://doi.org/10.1016/j.fsisyn.2022.100270>.

3 Curley, L. J., Munro, J., Dror, I. E. (2022). Cognitive and human factors in legal layperson decision making: Sources of bias in juror decision making. Medicine, Science and the Law, 62(3), pp. 197–206. <https://doi.org/10.1177/00258024221080655>.

4 Cui, J., Shen, X., Wen, S. (2023). A survey on legal judgment prediction: Datasets, metrics, models and challenges. IEEE Access, 11, pp. 102050–102071. <https://doi.org/10.1109/ACCESS.2023.3317083>.

5 Sachoulidou, A. (2023). Going beyond the 'common suspects': To be presumed innocent in the era of algorithms, big data and artificial intelligence. Artificial Intelligence and Law, pp. 1–54. <https://doi.org/10.1007/s10506-023-09347-w>.

tory of comparative law enhances the comprehension of criminal procedure, yet necessitates methodological prudence to prevent misinterpretations and the genetic fallacy.[6] Chukwuma's research on terrorism trials in Nigeria shows that proof actively shapes legal truth within the framework of pre-crime rationality.[7] Alpes and Baranowska's research shows that evidence of pushback against asylum seekers is often reduced or left out of ECtHR judgments because of proof practices and the state's assumption of good faith. This makes it harder to see the factual truth and the political side of border violence.[8]

The literature consistently demonstrates that proof is neither neutral nor mechanistic. Numerous studies underscore the constraints of formal proof efficacy, the impact of cognitive bias on evidence evaluation, and the conflict between technological efficiency and the safeguarding of human rights. However, these studies still tend to discuss proof in a fragmented manner—whether from a doctrinal, probabilistic, or technological perspective—without developing an integrated epistemological framework that explains how the inferential transition from evidence to legal fact can be rationally justified and its truthfulness assessed.

Based on these conditions, there is a research gap in the form of the absence of an approach that systematically links legal proof theory with epistemological and philosophical foundations. This gap leads to the legitimacy of legal truth in judicial decisions often being assumed as a consequence of procedural compliance or the judge's subjective beliefs, rather than being critically evaluated based on the quality of reasoning and its epistemic justification.

The novelty of this article lies in the introduction of Epistemic-Justificatory Proof Theory, an approach that views proof as an epistemic practice requiring inferential transparency, rational coherence, and intersubjective testability. By integrating legal theory and the philosophy of science, this article offers a new evaluative framework for assessing the legitimacy of judicial decisions while also placing evidence within the value horizon of a democratic rule of law, including in the context of Indonesia, which is based on Pancasila.

This article is structured as follows. The first part discusses judicial interpretation and proof as a process of seeking truth. The second part outlines the epistemological basis of judicial reasoning in proof. The third part analyzes the judge's decision as a practice of language and rational justification and formulates Epistemic-Justificatory Proof Theory as the main theoretical contribution of this research.

METHODOLOGY

This research uses a qualitative-normative (doctrinal) approach, supported by conceptual-philosophical and limited comparative analysis. The doctrinal approach is used to map the concepts of interpretation, standards of proof, and decision-making within the framework of the rule of law, while conceptual-philosophical analysis is used to reconstruct proof as an epistemic practice—that is, to assess how the inferential transition from evidence to legal facts is constructed, tested, and rationally justified. Limited comparison is used to examine the development of modern proof problems (e.g., scientific, statistical, and algorithmic evidence) as material to sharpen arguments in the Indonesian context. This combination of methods was chosen because the research objective was not to empirically measure the behavior of judicial actors but rather to explain the structure of

6 Roberts, P. (2025). Standards and methods of proof: An English perspective on Della Torre's comparative legal history. Quaestio Facti, no. 9, pp. 225–239. <https://doi.org/10.33115/udg_bib/qf.i9.23151>.

7 Chukwuma, K. H. (2025). Evidencing terrorism: Juridical truth-making in terrorism trials. European Journal of International Security, pp. 1–18. <https://doi.org/10.1017/eis.2024.60>.

8 Alpes, M. J., Baranowska, G. (2025). The politics of legal facts: The erasure of pushback evidence from the European Court of Human Rights. Law and Social Inquiry, 50(1), pp. 225–248. <https://doi.org/10.1017/lsi.2024.27>.

judges' reasoning and justification and formulate an evaluative framework for Epistemic-Justificatory Proof Theory. Therefore, the use of these methods directly supports the achievement of the research objective: to produce a model for assessing the legitimacy of legal truth that emphasizes coherence, transparency, and intersubjective testability.

1. JUDICIAL INTERPRETATION AND PROOF AS A PROCESS OF TRUTH-FINDING

1.1. Indeterminacy of legal meaning and the role of judges in shaping judicial decisions

Ronald Dworkin argued that legal interpretation is never neutral; when a rule is recognized as legitimate law, that recognition implicitly provides a moral basis for the state to use coercion in enforcing rights and obligations.[9] This view asserts that legal interpretation always operates within a specific value horizon, thus fundamentally challenging Hans Kelsen's position, which views law as a pure normative order free from non-legal elements.[10] This belief confirms that from the initial interpretation stage, claims of legal truth have been bound to normative considerations that cannot be fully neutralized.

This argument is also supported by H. L. A. Hart, who, through his analysis, addressed the uncertainty of the meaning of legal rules. Hart argues that in certain situations, judges cannot fully base their decisions on existing positive rules because primary rules contain the possibility of ambiguity or uncertainty about meaning. A classic example is the rule, "No vehicles are allowed in the park". In many situations, this ban clearly applies to cars, but a gray area (penumbra) emerges when faced with other types of "vehicles", such as motorized wheelchairs or toy cars.[11]

In that penumbral space, the judge legitimately used discretion and considered non-legal norms, including moral considerations, to build a justifiable basis for the decision. So in this case, the uncertainty of meaning is not an anomaly but rather an inherent characteristic of primary rules, making the use of discretion not only legitimate but also a structural consequence of the very practice of interpreting law.

1.2. Proof as a rational endeavor to establish truth

The uncertainty of legal meaning that arises at the interpretation stage does not stop at the level of the norm but continues directly to the evidence stage in court. In this context, a standard of proof is needed as a normative threshold to determine when evidence can be considered strong enough to render a positive decision, such as finding the defendant guilty in a criminal case.[12] In other words, the law of evidence does not merely function to determine right or wrong procedurally but serves as an epistemic mechanism to justify the transition from evidence to valid legal facts.

In this regard, judges can be understood to act like "researchers": every fact established as a "legal fact" must be testable, and its truth accountable. Tom R. Tyler asserts that the court's decision does not sufficiently rely on positive law or intuition but must be based on empirical evidence that can be rationally evaluated.[13]

9 Lefkowitz, D. (2024). A new philosophy for international legal skepticism? International Theory, 16(2), pp. 237–268. <https://doi.org/10.1017/S1752971924000010>.

10 Dziadzio, A. (2021). The academic portrait of the creator of the pure theory of law: Several facts from Thomas Olechowski's book entitled Hans Kelsen. Biographie eines Rechtswissenschaftlers. Tübingen: Mohr Siebeck, 2020 (1027 pp.). Krakowskie Studia z Historii Państwa i Prawa, 14(3), pp. 383–395. <https://doi.org/10.4467/20844131ks.21.028.14093>.

11 Riesthuis, T. (2023). The legitimacy of judicial decision-making: Towards empirical scrutiny of theories of adjudication. Utrecht Law Review, 19(2), pp. 75–76. <https://doi.org/10.36633/ulr.877>.

12 Ross, L. (2024). The philosophy of legal proof. Cambridge University Press.

13 Liu, W., Li, X., Li, G. (2025). The contributions of philosophy of science in science education research: A

The argument shows that the demands can only be met if the judge has an adequate epistemological perspective, namely, a deep understanding of the foundations of knowledge within the framework of the philosophy of science. This perspective is necessary to achieve clarity of meaning and ensure that the basic statements of theory and the scientific method can be understood and used meaningfully in the judicial process. Therefore, the next section discusses the role of judges and the relevance of the philosophy of science as a framework for assessing and justifying truth claims in court decisions.

2. PHILOSOPHY OF SCIENCE AND THE FORMATION OF TRUTH IN JUDICIAL DECISIONS

2.1. Judicial reasoning in the age of legislation: from statutory texts to epistemic foundations

Justice Scalia stated that "we live in an era of legislation, and most law is statutory law".[14] This statement confirms the dominance of written law in modern judicial practice. However, the application of legal norms does not work automatically; judges still need to construct meaning through legal reasoning. Inductive reasoning is often used here, which means making general conclusions based on specific case patterns.[15] This process is not only technical but also rests on three foundations of knowledge: ontology about the nature of legal norms, epistemology about how legal knowledge is acquired and justified, and axiology about the values that guide interpretation.[16] Thus, the judge's epistemic ability becomes a fundamental requirement for the formation of correct and accountable decisions.

2.2. Philosophy of science as a framework for establishing truth in proof

The philosophy of science explains the epistemological framework of law enforcement. Karl Popper showed that scientific knowledge is not supported by final proof, but rather by its resistance to falsification. A theory is considered robust to the extent that it withstands testing and is open to refutation.[17] This analogy is relevant to legal proof: a judge's conclusions about facts are never absolute but are the result of eliminating alternatives through applicable standards of proof.

Thomas Kuhn later emphasized that the prevailing paradigm influences a community's assessment of truth. Paradigms shape our understanding of fact, legitimate methods, and acceptable forms of argumentation. When anomalies accumulate, paradigms may disintegrate, resulting in conceptual transformations.[18] In law, a change in the standard of proof or method of interpretation can be understood as a shift in the interpretive paradigm due to case pressure and the dynamics of social values.

Imre Lakatos then refined the tension between Popper and Kuhn through the concept of

literature review. Science and Education, 34(3), pp. 1203–1222. <https://doi.org/10.1007/s11191-023-00485-w>.

14 Molnár, S. J. (2024). US constitution and the notion of family: The risks of the Supreme Court's judicial activism through family and privacy cases. Pázmány Law Review, 11(1), pp. 81–99. <https://doi.org/10.55019/plr.2024.1.81-99>.

15 Garbuio, M. Lin, N. (2021). Innovative idea generation in problem finding: Abductive reasoning, cognitive impediments, and the promise of artificial intelligence. Journal of Product Innovation Management, 38(6), pp. 701–725. <https://doi.org/10.1111/jpim.12602>.

16 Smith, M., McCulloch, T., Daly, M. (2025). Being, knowing and doing: Aligning ontology, epistemology, and axiology to develop an account of social work as practice. Social Work Education, 44(3), pp. 522–537. <https://doi.org/10.1080/02615479.2024.2330598>.

17 Archer, R. (2024). Retiring Popper: Critical realism, falsificationism, and the crisis of replication. Theory and Psychology, 34(5), pp. 561–584. <https://doi.org/10.1177/09593543241250079>.

18 Sciortino, L. (2021). The emergence of objectivity: Fleck, Foucault, Kuhn and Hacking. Studies in History and Philosophy of Science, 88, pp. 128–137. <https://doi.org/10.1016/j.shpsa.2021.06.005>.

research programs. A program is progressive if it can create new, coherent solutions to problems, but it is degenerative if it only fixes problems with patchwork solutions.[19] This analogy is relevant for understanding the development of legal doctrine: an interpretive theory capable of providing answers to new problems will drive changes in jurisprudence and become the dominant interpretive program.

Paul Feyerabend cautioned against the perils of the dominance of a singular methodology. According to him, the dominance of Western science has the potential to silence other forms of knowledge, leading to epistemicide.[20] In a legal context, this view reminds us that truth in the judiciary is not built solely on the text of the law or positivist logic. Evaluating facts and interpreting norms requires space for social experience, morality, and cultural context to make decisions more just and contextual.

Michael Polanyi reinforced this notion by asserting the existence of tacit knowledge: aspects of knowledge that cannot be fully formalized, such as professional intuition and institutional habits.[21] Therefore, the judge's reasoning is not merely a literal application of the text but also a process of synthesizing professional experience and intuition that is not entirely written into the norms.

Furthermore, Jürgen Habermas emphasized that the legitimacy of normative claims requires communicative rationality, not merely internal consistency. A decision is normatively valid if it can be justified through uncoerced discourse with the strongest arguments.[22] So, the judge's decision should be open to rational evaluation by more than one person, not just claims from the text.

Wilfrid Sellars deconstructed the presumption that empirical experience exists in a neutral state. It indicates that experience is always understood through certain concepts and rules, so "the given" is an epistemological myth.[23] In law, the term means that facts do not simply exist but are constructed through legal categorization and the values that accompany it.

Quine deepened that criticism through epistemological holism. For him, knowledge claims are part of a network of beliefs, and empirical testing does not apply to a single proposition but rather to the coherence of the knowledge system as a whole.[24] In the practice of proof, the strength of an argument does not rely solely on a single piece of evidence but on the inferential coherence of all integrated evidence.

To affirm the connection between the epistemological foundations of the philosophy of science and the judge's reasoning process in proving and interpreting the law, various epistemological theories can be read as a complementary conceptual flow from the realm of theory to judicial practice. Dworkin, Hart, and Habermas place judicial reasoning within a normative-communicative horizon, emphasizing that the legitimacy of a decision requires moral accountability, recognition of the uncertainty of meaning, and openness to intersubjective rational testing. Conversely, Popper, Kuhn, Lakatos, and Quine highlighted the methodological dimensions of truth formation, demonstrating that assessments of facts and norms are never final but are always subject to tests of coherence, potential falsification, and the dynamics of paradigms and belief networks. Feyerabend

19 Özdemir, N. Türkben, Y. (2022). The problem of objectivity in science in Imre Lakatos. Türkiye İlahiyat Araştırmaları Dergisi, 6(1), pp. 247–264. <https://doi.org/10.32711/tiad.1070222>.

20 Muller, S. M. (2024). Feyerabend and decolonisation. Epistemology and Philosophy of Science, 61(3). <https://doi.org/10.5840/eps202461349>.

21 Preston, J. (2022). Gestalt epistemology: From Gestalt psychology to phenomenology in the work of Michael Polanyi. Philosophia Scientiae, 26(3), pp. 233–254. <https://doi.org/10.4000/philosophiascientiae.3668>.

22 Duvenhage, P. N. J. (2024). Reflections on Habermas's discourse ethics. Verbum et Ecclesia, 45(1), pp. 1–9. <https://doi.org/10.4102/ve.v45i1>.

23 O'Shea, J. R. (2021). What is the myth of the given? Synthese, 199(3–4), pp. 10543–10567. <https://doi.org/10.1007/s11229-021-03258-6>.

24 Parrini, P. (2021). Quine on analyticity and holism: A critical appraisal in dialogue with Sandro Nannini. Philosophical Inquiries, 9(1), pp. 95–112. <https://doi.org/10.4454/philinq.v9i1.359>.

and Polanyi criticized the inclination towards methodological formalism by advocating for epistemic pluralism and the significance of tacit knowledge in the judicial inference process. Conversely, Sellars, through his critique of "the given", emphasized that legal facts are never presented neutrally but are always constructed through conceptual categories and legal language.

The synthesis of these thoughts confirms that proof and interpretation are not mechanistic processes but rather layered epistemic practices that are tentative, discursive, and value-laden. Thus, the legitimacy of a decision is not sufficiently determined by internal logical consistency or textual adherence to the law but also by inferential coherence, transparency of reasoning, and the judge's ability to rationally explain why one conclusion is more reasonable than others within the prevailing values and paradigms. This epistemological perspective enriches legal analysis by shifting the focus of evaluation from merely the operative part of a judgment to the quality of judicial reasoning as the basis for the legitimacy of legal truth.

3. LANGUAGE OF PROOF AND JUDICIAL TRUTH IN JUDICIAL DECISIONS

3.1. Judicial decisions as linguistic practices and legal reasoning

A court decision is a written ruling issued by a court to resolve disputes and determine the rights and obligations of the parties in a case.[25] Peter M. Tiersma's statement that "our law is a law of words, and words are the lawyer's primary tool" affirms that law inherently operates through language. Legal norms do not function as neutral, abstract structures but are present, understood, and enforced through linguistic practices.[26]

Therefore, language cannot be reduced to a mere technical medium but is an ontological prerequisite for the existence and effectiveness of law. Developments in the study of legal linguistics indicate that language use directly influences how law is interpreted, applied, and legitimized in judicial practice. Thereby, in this case, the quality of legal reasoning in court decisions significantly depends on the accuracy and consistency of the judge's interpretation of legal language.

This view aligns with Arthur Kozak's theory of juriscentrism, which understands law as a cultural phenomenon that lives within the mental structures and institutional practices of the legal community, rather than as a normative system that exists independently before being interpreted. According to Kozak, law is formed through the internal rationality of jurists, which operates through professional discretion, methods of interpretation, and conceptual frameworks learned institutionally. Legal reality is, therefore, intra-institutional: it exists within the technical language, reasoning patterns, and interpretive practices of legal professionals. Consequently, legal language represents social reality and actively constructs factual experiences into legal categories that are often inaccessible to lay understanding.

In this context, the judge's decision can be perceived as the outcome of a process of interpreting legal significance through systematic legal reasoning. This process demands a theoretical framework of proof that is not only procedurally valid but also rationally accountable. In the law of evidence, at least four classic theories are recognized. *Positief Wettelijk* limits proof to the evidence determined by law without the normative relevance of the judge's conviction.[27] *Negatief Wettelijk*, which is adopt-

25 Su, Y., Liu, K., Cheung, A. K. F. (2023). Epistemic modality in translated and non-translated English court judgments of Hong Kong: A corpus-based study. Journal of Specialised Translation, no. 40, pp. 56–80. <https://doi.org/10.26034/cm.jostrans.2023.525>.

26 Glogar, O. (2023). The concept of legal language: What makes legal language 'legal'? International Journal for the Semiotics of Law, 36(3), pp. 1081–1107. <https://doi.org/10.1007/s11196-023-10010-5>.

27 Pangestu, K., Suyanto, H., Agustanti, R. D., (2021). Application of circumstantial evidence in criminal laws

ed in Indonesia, requires a combination of valid evidence and the judge's belief as the basis for sentencing.[28] *C* Conviction Intime places the judge's inner conviction as the basis for the decision but still requires its formation through a rational evaluation of the evidence.[29] Meanwhile, Conviction Raisonnée demands that such a conviction be accompanied by a rational justification that can be tested and intersubjectively accounted for, particularly through the standard of beyond a reasonable doubt.[30]

3.2. Proof, rationality, and the construction of judicial decisions

However, contemporary philosophy of science shows that adherence to proof procedures and recognition of judges' subjective beliefs are no longer sufficient to support claims of legal truth. The core issue of proof lies in its epistemic dimension, namely "how the inferential steps from evidence to legal facts are constructed, tested, and accounted for". In this context, structural tension arises between formal procedurality—such as rules of evidence and court procedures—and the demands of epistemic rationality, which require coherent, testable, and open-to-criticism reasoning as a prerequisite for the legitimacy of judicial decisions in a democratic rule of law state.

From the perspective of legal epistemology, as previously outlined, the thinking of Dworkin, Hart, Popper, Kuhn, Lakatos, Feyerabend, Polanyi, Habermas, Sellars, and Quine clarifies this tension. Dworkin asserts that legal interpretation always contains a moral dimension. Hart demonstrated that semantic ambiguity in legal rules renders judicial discretion unavoidable. Popper emphasized testability and the possibility of falsification as conditions for the rationality of knowledge. Kuhn and Lakatos explained that knowledge develops through paradigm shifts and the dynamics of research programs. Feyerabend criticized the monopoly of a single method and defended epistemic pluralism. Polanyi highlighted the role of tacit knowledge, which cannot be fully reduced to explicit rules. Habermas links legitimacy to communicative rationality and domination-free deliberation. Sellars and Quine subsequently repudiated the presumption of a "given" foundation of knowledge devoid of a coherent conceptual framework.

The epistemological consequence of this overall view is that the standard of proof cannot stop at the formula of "judicial belief" but must be raised to an epistemic condition worthy of being called accountable rational knowledge.[31] Proof, therefore, must be conducted professionally and reliably, avoiding inferential errors and treating evidence proportionally to the severity of the consequences that will be imposed.[32]

This epistemic challenge is evident in the proof paradox, which is a situation where the statistical probability is very high but is still not felt to be sufficient as a basis for a judge's decision.[33] The Blue Bus case, Prisoners, Gatecrasher, Riot, Smith v. Rapid Transit Inc., and cold-hit DNA show that probability alone is insufficient to identify individuals, especially when there is

in Indonesia. Jurnal Hukum Novelty, 12(1), pp. 54–66. <https://doi.org/10.26555/novelty.v12i01.a16996>.

28 Giri Santosa, D. G., Ibnu Kamali, K. M. (2022). Acquisition and presentation of digital evidence in criminal trial in Indonesia. Jurnal Hukum dan Peradilan, 11(2), pp. 195–218. <https://doi.org/10.25216/jhp.11.2.2022.195-218>.

29 Tuzet, G. (2021). Evidence assessment and standards of proof: A messy issue. Quaestio Facti, no. 2, pp. 87–113. <https://doi.org/10.33115/udg_bib/qf.i2.22480>.

30 Ambos, K. (2023). 'Intime conviction' in Germany: Conceptual foundations, historical development and current meaning. Quaestio Facti. Revista Internacional Sobre Razonamiento Probatorio, 4(1), pp. 167–189. <https://doi.org/10.33115/udg_bib/qf.i1.22839>.

31 Summers, S. J. (2023). The epistemic ambitions of the criminal trial: Truth, proof, and rights. Quaestio Facti. Revista Internacional Sobre Razonamiento Probatorio, 4(1), pp. 249–272. <https://doi.org/10.33115/udg_bib/qf.i1.22809>.

32 Guerrero, A. (2021). The interested expert problem and the epistemology of juries. Episteme, 18(3), pp. 428–452. <https://doi.org/10.1017/epi.2021.36>.

33 Spottswood, M. (2021). Philosophical foundations of the law of evidence: Chapter 7 – Paradoxes of proof. Oxford University Press.

still uncertainty about the accuracy of the statistical model used (meta-uncertainty).[34] The conjunction paradox and the judgment paradox illustrate that the probability of each component of a case may appear sufficient in isolation; however, when aggregated, it fails to satisfy the burden of proof, resulting in a discord between the evaluation of individual components and the overall conclusion during judicial deliberations.[35] The paradox of expertise also highlights the limitations of non-technical judges in assessing the reliability and admissibility of expert testimony.[36] On the other hand, Ross shows that under certain epistemic gap conditions—when factual harm is real but individual perpetrators cannot be identified—the use of statistics can be morally and legally justified to achieve corrective and distributive justice.[37]

From the perspective of legal epistemology, the proof paradox teaches that proof cannot be reduced to just two things: the fulfillment of formal evidence or the highest statistical probability. Both are important, but they do not automatically produce adequate intersubjective justification. Fratantonio shows that a purely epistemic approach—which focuses only on knowledge, the risk of error, or the structure of justification—fails to explain why testimony is often accepted while purely statistical evidence is rejected, even though the statistics may be more accurate.[38] This preference is based on moral and institutional ideas about how the legal system should treat people with respect, not just as numbers in a probability distribution. Therefore, the proof paradox is not only an epistemic problem but also a moral-institutional problem that touches upon the fundamental design and values of the justice system.

If this overall perspective is drawn into the law of evidence, then ideal proof must be understood as an "epistemic practice" subject to the demands of rationality, transparency, and testability. In determining what should be believed, epistemic reasons have an independent and normative status that cannot be overridden by practical reasons except indirectly, namely, through practical reasons for believing correctly according to epistemic standards.[39] Consequently, proof can no longer be perceived as a procedural instrument for formally validating evidence; instead, it should be regarded as an intellectual endeavor for substantiating factual assertions through a publicly accountable framework of reasoning.

Within this framework, the reasoning and inferences contained in the judge's decision-making considerations must be logically, explicitly, and systematically structured so that they can be reconstructed step by step by other parties. Proof reasoning is required to be publicly accessible, open to intersubjective verification, and—if necessary—ready to be corrected or refuted through stronger arguments or counter-evidence.

This principle is reflected, among other things, in the case of Compulife Software Inc. v. Newman (2020), where the court affirmed that the fact that the data came from a publicly accessible source does not automatically make the method of obtaining it lawful. Manual access within human capabilities is qualitatively different from the use of automated programs capable of collecting data in quantities practically impossible for humans, thus raising its own normative issues. A similar approach is also evident in the case of DHI Group, Inc. v. Kent (2019), when the court refused to grant

34 Steele, K., Colyvan, M. (2023). Meta-uncertainty and the proof paradoxes. Philosophical Studies, 180(7). <https://doi.org/10.1007/s11098-023-01951-5>.

35 Pardo, M. S. (2019). The paradoxes of legal proof: A critical guide. Boston University Law Review, 99(1).

36 Martini, C. (2015). The paradox of proof and scientific expertise. Humana.Mente Journal of Philosophical Studies, 8(28), pp. 1–16.

37 Ross, L. (2021). Justice in epistemic gaps: The 'proof paradox' revisited. Nous-Supplement: Philosophical Issues, 31(1). <https://doi.org/10.1111/phis.12193>.

38 Fratantonio, G. (2021). Evidence, risk, and proof paradoxes: Pessimism about the epistemic project. International Journal of Evidence and Proof, 25(4). <https://doi.org/10.1177/13657127211035831>.

39 Kauppinen, A. (2023). The epistemic vs. the practical. In Oxford Studies in Metaethics (Vol. 18, pp. 137–162). <https://doi.org/10.1093/oso/9780198884699.003.0007>.

summary judgment in a trade secret dispute arising from the unauthorized taking of a database, as well as in United States v. Nosal (2016), which asserts that trade secrets can be a compilation of data from public, closed, or a combination of both sources.[40] In this case, the compilation's overall confidentiality, not the origin of each data element, determines it. Thus, the credibility of the decision no longer rests solely on procedural compliance but on the quality of the rational justification supporting the factual conclusions reached.

This framework demands the adoption of a new paradigm in proof theory, which can be called Epistemic-Justificatory Proof Theory. This paradigm is based on the idea that the validity of a decision is not determined solely by the fulfillment of formal evidentiary requirements, but rather by the quality of the reasoning used to justify the factual conclusions. Proof reasoning must meet the standards of epistemic justification, meaning it must be constructed rationally, coherently, and intersubjectively acceptable to those using the same standards of reasoning.

In this perspective, the legitimacy of proof undergoes a fundamental shift: from formal certainty toward epistemic testability, from reliance on institutional authority toward argumentative strength open to scrutiny, and from procedural legality toward rational legitimacy that respects the values of truth and epistemic justice. So, a valid decision is not only one that follows the law, but also one that can be justified epistemologically and intellectually in front of the public of legal reasoning.

The urgency of the epistemic-justificatory paradigm is becoming increasingly prominent as the complexity of evidence in modern legal practice grows, including scientific, statistical, algorithmic, and data analysis evidence. Open science practices demonstrate potential benefits for various actors in the legal system, including increased accuracy in assessing the strength of scientific evidence and improved trust in expert testimony.[41] A 2019 Pew Research Center survey showed that 54% of respondents trust scientific findings more when the data is transparently open.

In this context, purely statistical evidence (PSE) is understood as evidence that provides support solely through probability figures, without the support of other individual evidence such as witnesses, visual recordings, motive, or confessions. The classic example is the Prisoners and Blue Bus case. Ross emphasized that DNA profiling is essentially statistical evidence as well, because at trial, experts typically present the odds of a random match, for example, "one in a billion". However, the law does not automatically prohibit statistical evidence; the main issue is not admissibility, but whether the evidence is sufficient to meet the burden and standard of proof according to the objectives of the justice system. Therefore, statistical evidence can be considered usable under certain conditions, such as DNA evidence with a tiny error rate, but not always, as in the case of Prisoners.[42]

The advent of algorithms and the utilization of artificial intelligence have significantly transformed the domain of evidence. Algorithms are understood as "decision-making machines" that can assist various processes, but their acceptance heavily depends on the user's level of understanding and risk perception, particularly regarding bias and privacy.[43] At the same time, the theory of evidence-based inference using probabilistic reasoning shows that Dempster's rule is a direct extension of Bayes' rule and still operates on basic probabilities, not just degrees of subjective belief. Criticism of Dempster's rule often arises from the misuse of posterior prob-

40 Sobel, B. L. W. (2021). A new common law of web scraping. Lewis & Clark Law Review, 25(1), pp. 147–207.

41 McAuliff, B. D. et al. (2023). Psychology and law, meet open science. In The Oxford Handbook of Psychology and Law (pp. 71–96). <https://doi.org/10.1093/oxfordhb/9780197649138.013.5>.

42 Ross, L. (2021). Rehabilitating statistical evidence. Philosophy and Phenomenological Research, 102(1), pp. 3–23. <https://doi.org/10.1111/phpr.12622>.

43 Horowitz, M. C., Kahn, L. (2021). What influences attitudes about artificial intelligence adoption: Evidence from U.S. local officials. PLoS ONE, 16(10), pp. 1–20. <https://doi.org/10.1371/journal.pone.0257732>.

abilities or double-counting priors, rather than from inherent weaknesses in its probabilistic rationality.[44] This reinforces the view that evidence-based reasoning can still be probabilistically justified, even under conditions of uncertainty and imperfect data.

The intricacy of contemporary proof necessitates a thorough assessment of reliability, validity, and possible inferential inaccuracies. Without an adequate epistemological framework, the process of proof risks falling into epistemic overreach, which is the tendency to uncritically accept factual conclusions solely because they are supported by specific technical methods or scientific authority, without an adequate understanding of the methodological assumptions, empirical limitations, and normative context of their use. In such conditions, judicial rationality has the potential to be reduced to technocratic compliance, rather than the practice of intellectually and ethically responsible reasoning.

In the epistemic-justificatory paradigm, the legitimacy of decisions no longer primarily rests on the institutional authority of the decision-makers but rather on the quality of the epistemic reasoning that establishes inferential relationships between evidence, facts, and norms. An epistemically valid decision is required to exhibit epistemic transparency, which means an explicit explanation of the inference steps, the basis for choosing the reasoning model, the evaluation of error risks, and the rational reasons for accepting one inference and rejecting others. This epistemic transparency not only strengthens public accountability but also enables institutional learning within the judicial system, preventing judicial errors from being structurally reproduced.

Furthermore, Epistemic-Justificatory Proof Theory challenges the conventional separation between formal proof and the normative dimension. Because proof always takes place within a specific epistemic horizon, it is never completely value-free. Evidence, facts, and norms are constructed through a framework of knowledge that contains both methodological assumptions and ethical choices about how the risk of error is allocated and who bears the consequences. Therefore, epistemically valid proof must be open to rational evaluation that considers epistemic justice, the proportionality of the risk of error, and the fairness of the distribution of the burden of proof, particularly for parties in structurally vulnerable positions.

This framework gains a distinctive normative relevance within the context of Pancasila as the philosophical foundation of Indonesia's rule of law.[45] The principle of fair and humane treatment affirms that individuals should not be reduced to mere objects of proof or statistical variables,[46] but must be treated as dignified subjects entitled to understandable and accountable judicial reasons.[47] Meanwhile, the principle of social justice demands that the distribution of the risk of evidentiary error be done proportionally,[48] so that epistemic uncertainty is not unfairly placed on those who are socially and institutionally in a weaker position. Thus, epistemic justification in proof not only serves as a methodological requirement but also as a concrete embodiment of the basic values of Pancasila in modern judicial practice.

44 Xu, D. L., Yang, J. B., Wang, Y. M. (2025). Make evidence theory probabilistic again. Journal of Control and Decision, pp. 1–16. <https://doi.org/10.1080/23307706.2025.2495805>.

45 Susilo, E. (2025). Natural justice, procedural justice, and the judge's role in the Pancasila-based rule of law. Yurispruden: Jurnal Fakultas Hukum Universitas Islam Malang, 8(2), pp. 177–196. <https://doi.org/10.33474/yur.v8i2.23835>.

46 Aldyan, A. (2023). The Indonesian state law system is based on the philosophy of Pancasila and constitution. Res Judicata, 6(1). <https://doi.org/10.29406/rj.v6i1.4939>.

47 Yasir, M., Gunarto, G., Bawono, B. T. (2024). Legal reconstruction of suspect investigation based on Pancasila justice values. Scholars International Journal of Law, Crime and Justice, 7(01). <https://doi.org/10.36348/sijlcj.2024.v07i01.002>.

48 Sumadi, T., Casmana, A. R., Maiwan, M. (2024). The implementation of Pancasila values to early children through traditional ceremonies in Banceuy community. European Journal of Theoretical and Applied Sciences, 2(1). <https://doi.org/10.59324/ejtas.2024.2(1).36>.

Consequently, the reform of the theory and practice of proof cannot be limited to procedural aspects alone but must target the epistemic structures that underpin judicial and administrative practices. The reforms include developing reflective standards of proof, improving the epistemic literacy of legal decision-makers, and standardizing reasoning techniques and judgment writing that emphasize public justification. On a theoretical level, this paradigm opens up space for interdisciplinary dialog between law, epistemology, philosophy of science, cognitive psychology, and argumentative linguistics. On a practical level, it provides an evaluative framework for assessing whether a decision truly meets the demands of rational legitimacy in a pluralistic and value-based democratic society.

Thus, Epistemic-Justificatory Proof Theory offers a direction for conceptual transformation in how law understands and practices proof. The shift from proof as a procedural ritual toward proof as an epistemic practice allows legal systems to produce decisions that are more transparent, rational, and intellectually accountable. Within this framework, judicial reasoning is no longer understood as a closed technical activity but rather as a public practice that connects knowledge, power, and justice into a single normative unity that is open to scrutiny and accountability—in line with the demands of the rule of law, human rights protection, and the values of substantive justice in contemporary legal societies.

CONCLUSION

The judge's decision can no longer be understood as a "legitimate" procedural outcome simply because it meets the rules of evidence, but rather as an epistemic act that establishes legal truth and simultaneously bears the burden of legitimizing the use of state coercion. The research findings indicate that the complexity of contemporary evidence—scientific, statistical, and algorithmic—exacerbates the risk of bias, inferential errors, and the reduction of judicial deliberation to a formality or subjective belief. The main finding of this article is the need to assess the evidence based on the quality of its inferential transitions: how evidence is sorted, weighed, connected, and used as the basis for legal facts through coherent, explicit, and intersubjectively testable reasoning. The scientific novelty of this research lies in proposing Epistemic-Justificatory Proof Theory, an evaluative framework that shifts the focus of legitimacy from procedural compliance toward transparency of reasoning, rational coherence, and public testability of decision-making considerations. The added value of this approach is that it provides a conceptual standard for auditing the quality of evidentiary reasoning, including when courts are dealing with purely statistical evidence, expert testimony, or AI-based systems. Actionable recommendations include standardizing judgment writing techniques that display the steps of inference, improving epistemic literacy for judges to assess the reliability and validity of scientific/algorithmic evidence, and strengthening procedural safeguards that demand clear reasoning when technology is used in law enforcement processes. Looking ahead, further research could develop operational indicators for "inferential transparency", test their application to concrete rulings, and formulate standard proof designs that are more adaptable to data-driven evidence without sacrificing the protection of human rights and the dignity of legal subjects.

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The Dual Nature of Interim Measures in European Antitrust Enforcement: Administrative Implementation and Judicial Oversight

Imane Mamouche

Ph.D. in Private Law, Academic researcher, University of Morsli Abdallah, Tipaza, Algeria

mamouche.imane@cu-tipaza.dz

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ABSTRACT

The European legislature established interim measures as a crucial protective mechanism to avert the impending harm. These measures are applied by various institutions, including European courts and the European executive authority, highlighting their critical role in addressing diverse conflicts, particularly the violation of competition regulations. Antitrust activities constitute a delicate domain where dangers threaten both the common market (public interest) and competitors (private interests). Consequently, offering this tool will prevent further deterioration of injuries.

Nonetheless, despite their reputation, interim measures are challenging to obtain, rendering it nearly impossible to benefit from their advantages, prompting scrutiny of the legal frameworks upon which their efficacy relies.

This article seeks to elucidate the applications of interim measures in accordance with pertinent European legislation and clarify the context that has resulted in their infrequency in competition disputes, emphasising their legal nature as a vital element in their effectiveness in preventing or deterring violations of competition rules.

INTRODUCTION

The concept of interim measures was initially introduced into the European legal framework in 1980 by the European Court of Justice (ECJ) through the judgment of Camera Care. In this context, interim measures were characterised as "indispensable for the effective exercise of the European Commission's functions and, in particular, for ensuring the effectiveness of any decisions requiring undertakings to cease identified infringements".[1] The field of competition law appears to be the first to address the application of interim measures, as the primary issue involved the invocation of Article 3 of Regulation No. 17 of 1962. This regulation was the first to enforce Articles 85 and 86 (now Articles 101 and 102) of the TFEU concerning antitrust practices.[2]

In 1992, the ECJ further clarified the scope of interim measures in case N C-261/90, stating, "Provisional, including protective, measures are designed to maintain a factual or legal situation to safeguard rights whose recognition is sought from the court with jurisdiction over the substance of the matter".[3]

The preceding definitions clearly demonstrate that the fundamental purpose of interim measures is to provide an appropriate remedy, thereby facilitating the execution of the final decision by the competent authority.

Despite their critical function in averting harm, interim measures in European antitrust enforcement are notoriously difficult to obtain and are infrequently applied, particularly by the European Commission. Concerns arise regarding the effectiveness of current legal frameworks in protecting undistorted competition and the adequate use and understanding of existing tools. While existing scholarship often details the legal basis, there is a gap in comprehensively analysing practical implementation challenges and the divergent approaches of administrative bodies versus judicial oversight, especially in light of recent developments in the field.

This study aims to address the following question: How may interim measures serve as effective remedies in competition disputes?

This article contends that, despite their essential protective function, the existing legislative framework and actual implementation of interim measures by both the Commission and European courts are riddled with contradictions and obstacles, eventually undermining their efficacy. We assert that a major reassessment of the procedural and substantive criteria is essential to realise the complete potential of their dual nature in competition conflicts.

METHODOLOGY

This study employs a doctrinal legal research methodology, systematically analysing primary sources by interpreting relevant EU Regulations and Treaty articles both textually and contextually to uncover their legislative intent and evolution. It also examines judgments from the ECJ and General Court within a precedential framework, emphasising how interpretations have influenced the understanding and application of interim measures over time. Additionally, it critically reviews secondary sources to contextualise legal developments and identify prevailing scholarly debates concerning practical implementation challenges. Specific attention is paid to recent landmark cases, such as Illumina/GRAIL and Broadcom, and the implications of new legislative instruments like the Digital Market Act (DMA).

To identify patterns, challenges, and discrepancies, the study employs a comparative analytical framework, juxtaposing the administrative implementation of interim measures by the Commission with their judicial oversight by the European courts. This comparison will high-

1 Court of Justice. (1980). Case 792/79 R, Camera Care Ltd v. Commission of the European Communities, EU:C:1980:18. Luxembourg, p 129.

2 Burnside, A. J., Kidane, A. (2018). Interim measures: An overview of EU and national case law. E-Competition Antitrust Case Laws e-Bulletin. N 86718, p. 2. <https://www.concurrences.com>.

3 Chocron Giraldez, A. M. (2016). Interim measures and EU legislation. E-Revista International de la Protection Social, 1(1), p. 137.

light divergences in application criteria (prima facie, urgency, proportionality). Furthermore, a critical legal lens will be applied to assess the efficacy and fairness of the current legal frameworks to uncover ambiguities.

Interim measures, by their very nature, are designed to provide rapid relief. This study will evaluate whether the current legal and practical frameworks truly facilitate swift intervention and achieve their protective objectives. To address this enquiry, this article is structured as follows: Section 1 delves into the implementation of interim measures by the Commission, focusing on their applications in merger control and antitrust enforcement. Section 2 shifts to the judicial implementation of interim measures, scrutinising the European Courts' role in enacting them.

1. THE ADMINISTRATIVE IMPLEMENTATION OF INTERIM MEASURES

The Commission, which serves as the executive authority for EU competition legislation, has jurisdiction to enforce these measures in two specific contexts. The first pertains to merger control, which is executed prior to the market entry of a new entity. The second context arises when competitors enter the market, introducing varying degrees of economic risk.

1.1 The use of interim measures in regulating mergers

The Commission is authorised to enact interim measures to protect the competitive environment from threats arising from a merger or acquisition project by invoking Article 8(5) of Regulation No. 139/2004,[4] particularly concerning the risk of abuse of a dominant position, in accordance with Article 102 of the TFEU.

4 Regulation (EC) No 139/2004. (2004). On the control of concentrations between undertakings (merger control Regulation). OJEU L 024.

1.1.1 Achieving effective competition

Effective competition is a core objective of competition policy, as established in the European Economic Community Treaty (EEC).[5] Although this purpose is attained by outlawing any restrictive practices that do not qualify as exemptions (Article 101 TFEU) or that distort market structure through the actions of abusive dominant enterprises (Article 102 TFEU), a satisfactory description of this notion is still lacking.

For instance, although the ECJ delineated effective competition in the Metro-SB-Grossmarkte case as the requisite level of competition to ensure adherence to fundamental principles and the attainment of treaty objectives,[6] it remained ambiguous. Regarding the Commission, Veljanoski explicitly articulated that: "It's rare to find in EC antitrust texts, or in statements by the Commission, a clear expression of the nature of effective competition".[7] Article 8 of Regulation 139/2004 explicitly articulates the concept of effective competition by delineating the objective of interim measures to maintain or restore it. The Commission has not yet provided further elaboration on this matter.

To further understand this concept, it is crucial to reference John Maurice Clark's theory of effective competition, which is described as a dynamic process that includes a sequence of subtle competitive actions and reactions that are constantly changing. This theory asserts that the short-term financial health of firms is paramount.[8]

Effective competition necessitates a specific market structure characterised by moderate concentration and a loose oligopoly, indicating the earlier existence of dominant enterprises. This structural focus helps explain why Article 8 of Regulation 139/2004, designed for merger control, explicitly articulates the concept of

5 Baskoy, T. (2005). Effective Competition and EU Competition Law. Review of European and Russian Affaires, 1(1), p. 2.

6 Ibid., p. 4.

7 Veljanovski, C. (2004). EC Merger policy after GE/Honeywell and Airtours. The Antitrust Bulletin, 49(1-2), p. 179.

8 Baskoy, T., op. Cit., pp. 7-8.

effective competition, unlike Article 8 of Regulation 1/2003, which addresses ongoing infringement.[9]

The Commission's objective in this case is to prevent these corporations from exploiting their dominant position through antitrust actions, such as unfair, exclusive, or predatory tactics. Consequently, the use of interim measures appears suitable, as they correspond with the fundamental nature of this notion.

1.1.2 The reality of achieving effective competition in the Illumina/Grail case

After several member states asked for a referral (notification), the Commission decided to start proceedings because it found that the acquisition raised "serious doubts" owing to the creation of vertical integration between two different supply chain companies. The merger in question is characterised as a "killer acquisition", typically involving a huge corporation acquiring a creative startup, which often has minimal or non-existent turnover, as is the case with GRAIL. This form is exempt from the merger control criteria established in Article 4 of Regulation 139/2004, complicating the identification of the appropriate body, whether the Commission or National Competition Authorities. This prompted the Commission to adopt an expansive interpretation of Article 22 to incorporate flexibility into the regulatory standards. Consequently, subjecting mergers below-thresholds within its jurisdiction.[10]

While the Commission was still conducting its investigation, Illumina publicly announced the finalisation of its acquisition of GRAIL, constituting a clear violation of the standstill obligation as stipulated in Article 7 of Regulation 139/2004. Over two months later, temporary steps were implemented in response to Illumina's "gun jumping" conduct. A year later, the Commission enacted a second interim measure due to the issuance of an incompatible decision and failure to comply with the initial measures.

– Substance of applied interim measures

In both decisions, the Commission ensured that certain changes were implemented to prevent the formation of a new company, which helped keep Illumina separate from Grail, the primary goal they wanted to achieve. Additionally, it prepared Grail for a potential divestment to disrupt market dominance by introducing a new competitor, thus averting the risk of market power abuse by Illumina.[11]

Furthermore, the commission implemented a behavioural remedy characterised by limitations on information exchange. Ezrachi believes that pursuing behavioural treatments is more adaptable, beneficial, and cost-effective than structural solutions for expanding markets, such as the European Union.[12] The resolution of the issue through an appropriate remedy relies on the Commission's discretionary authority, which is determined by the nature of the infringement. Despite elevated expenses and purchaser difficulties, structural remedies are considered the most effective temporary options in merger cases because they immediately tackle anticompetitive behaviour by altering the market structure to promote competition.

These commitments arose from prima facie, urgency, and proportionality considerations, despite Article 8(5) of Regulation No. 139/2004 not explicitly referencing them. This is due to the regulation's distinct structure, which necessitates a more comprehensive evidentiary presentation prior to decision-making, aimed at averting premature and potentially detrimental interventions in mergers that may ultimately be approved.[13]

9 Council Regulation (EC) No 1/2003. (2002). On the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJEU L 1/1.

10 Bagnoli, V., Faraone. M. F. N. (2025). Illumina/Grail: the "new normal" of killer acquisition and below-threshold acquisitions in search of reconsideration. Market and competition law review, 9(2), pp. 117, 121.

11 Decision C (2024) 6433 final. (6 September 2024), Withdrawal decision Regulation (EC) 139/2004, pp. 2-4.

12 Ezrachi, A. (2006). Under and over-prescribing of behavioural remedies. Centre for Competition Law and Policy, University of Oxford. Working paper No. L 13/15, p. 4, 5. <https://doi.org/10.2139/ssrn.913773>.

13 Mergers Overview. Competition. European Union.

Nonetheless, accomplishing this is challenging when temporary measures necessitate a swift response, which may mislead the Commission.

– Legal ambiguities inherent in the implemented interim measures

Notwithstanding the Commission's efforts to ensure effective competition throughout the transaction, the protracted nature of the Illumina/GRAIL proceedings, culminating in identical obligations across multiple decisions, raises serious questions regarding the timeliness and effectiveness of the Commission's interim measures. This protracted process deviates significantly from the ideal of swift, decisive intervention aimed at preventing irreversible harm, suggesting that the measures functioned more as an extended market test rather than a rapid protective mechanism.

First, the interim measure decisions from October 2021 and 2022 display identical obligations, notably highlighting structural separation, financial discovery, autonomous management, and information restriction. This outcome indicates that either the transaction did not affect competition during the second instance (effective competition remains intact, so restoration is unnecessary) or that the Commission failed to recognise the alleged antitrust infringement because reinstating previously overlooked interim measures is irrational. This outcome is connected to the Commission's ambiguity regarding its findings, as making a timely decision could compromise the interests of the merger initiators, thereby elucidating Illumina's swift response. Schweitzer cautions that when the data is less extensive, we should approach temporary solutions with greater prudence.[14]

Illumina is confident that vertical integration with GRAIL will enhance efficiency by expediting the introduction of GRAIL's blood test within the European Economic Area (EEA). Furthermore, there were no existing competitors to Grail in the downstream market, only potential ones that may or may not materialise in the future, attributable to the creation of the "Gallery" cancer screening test. Moreover, Illumina is not the sole provider of next-generation sequencing systems in the upstream market; other rivals offer analogous services that match Illumina's price and functionality, rendering the foreclosure action ineffective for the company.[15]

Second, the Commission's restorative measures. According to the press release dated April 12, 2024, the restorative measures will follow the interim measures, as explicitly stated: "As regards the transitional measures ... They will replace the interim measures adopted by the Commission on October 22, 2022, which are currently in effect". This affirms that "restoration" is not a temporary measure within merger control, which contradicts Article 8(5).

Lastly, the Commission was mistaken in accepting the referral. The Commission overstepped its power by interpreting Article 22 TFEU as a remedial mechanism because it lacked the jurisdiction to review below-threshold mergers. This misapplication of the law resulted in ineffective interim remedies because Illumina halted the unwinding of Grail in June 2024 after the Commission accepted its planned commitments in April 2024.[16] Illumina invoked Article 9 of Regulation 1/2003 to modify the remedial measures to its advantage.

1.2 The use of interim measures in halting antitrust acts

When the enquiry demonstrates to the Commission the presence of anticompetitive practices, and the impact of these actions poses a

<https://competition-policy.ec.europa.eu>.

14 OECD. (2022). Interim measures in antitrust investigations. OECD Competition Policy Roundtable Background Note, p. 14. <https://oecd.org>.

15 Illumina/Grail. (2021). Briefing paper on the competition case and benefits of the transaction for EEA patients. Paras. 3.4, 4.3, pp. 4-6. <https://appliedantitrust.com>.

16 European Commission. (2024). Commission approves Illumina's plan to unwind its completed acquisition of Grail. Press-release, p. 1. <https://eu.europa.eu>.

genuine threat, the nature of the interim measures will shift to serve as a deterrent to further obstructing competition. However, such metrics are associated with the fulfilment of specific criteria that distinguish between a conventional and digital market, such as the following:

– The impact of the assessment factors on the efficacy of interim measures

Article 8 of Regulation 1/2003 explicitly stipulates that in cases of urgency, where there is a threat of significant and irreversible damage to competition during investigations, the Commission may impose interim remedies based on a prima facie determination of the infringement. Nonetheless, only anticompetitive activities that exhibit "serious doubts of infringement at first glance" and cause "serious and irreparable harm" to competition are subject to these proceedings. Moreover, it is widely acknowledged that the principle of proportionality significantly influences the permissible scope of interim measures in each instance to provide an equitable balance among the various interests involved. This arises from the potential confrontation with the undertakings' rights, including property rights in the context of structural remedies and business rights in the context of behavioural remedies.[17]

These remarks are seen as a double-edged sword, as they provide extensive interpretation that may lead to adverse consequences, exemplified by the IMS Health case in 2001. The General Court's ruling suspended the Commission's temporary actions. Consequently, this resulted in the Commission's inertia in implementing them.

Frinhas attributes the limited application of Article 8 of Regulation 1/2003 to the Commission's decision to implement a retrenching policy, which facilitated the emergence and economic development of firms, particularly in the early 2000s, by refraining from ordering interim measures due to concerns about potential errors,[18] referring to the widespread understanding that interim measures are excluded if the case raises new or complex matters of law or fact.[19]

This apprehension clearly reflects the Commission's challenges in addressing the legal framework of interim measures, rendering success nearly unattainable, particularly when complainants lack the right to request such measures. While this may alleviate some of the Commission's burdens, it is not universally beneficial.

In its ruling on Broadcom, the Commission seemingly achieved its prima facie case but did not fulfil the urgency requirement. The commission determined, via a market test, that there was an abuse of dominance characterised by "exclusivity-inducing provisions" in the chipset market for TV set-top boxes and modems that raised "serious doubts".[20]

The Commission has acknowledged that the final decision will not rectify the irreversible damage, aside from eliminating competitors or marginalising others.[21] The Commission's delay in the Broadcom case, where it did not fulfil the urgency requirement, undermines the predictability and reliability of interim measures. If the very criterion of urgency, fundamental to the nature of interim relief, is inconsistently applied, it creates uncertainty for both complainants and undertakings, thereby diminishing the system's overall effectiveness as a deterrent and protective tool.

Nevertheless, the Commission took four months to order Broadcom to fix its actions by agreeing to end the exclusivity clauses with the companies it worked with and avoid using such

17 Leandro Vasconcelos, R. (2021). The adoption of remedies under Regulation 1/2003: between success and coherence. Market and competition law review, 5(2), p. 158.

18 Farinhas, C. (2025). Interim measures in digital markets: interaction between the DMA and Regulation 1/2003. Utrecht Law Review, 21(2), p. 29. DOI:10.36633/ulr.1118.

19 Farinhas, C. (2023). Are interim measures under Regulation 1/2003 excluded in new or complex cases? Journal of European Competition Law & Practice, 14(8), p. 16.

20 Decision C (2019) 7406 final. (16 October 2019). Case AT.40608-Broadcom, p. 17.

21 Ibid., p. 98.

unfair terms with them in the future.[22] This time, the Commission implemented only behavioural remedies owing to the changeable character of interim measures, particularly when the purported anticompetitive behaviour arises from the contractual relationship between the enterprise and the economic entities,[23] as in the case of Broadcom.

The Commission's interim measures seek to avert the occurrence of exclusivity provisions in the future while also terminating them. Nonetheless, the success of the case was attributed not to the Commission's efforts but to proactive engagement in proposing alternative commitments. In response to interim remedies, Broadcom offered pledges to alleviate the Commission's concerns, concluding the probe after a full year, in July 2020.[24]

The Broadcom case, where commitments were ultimately preferred, illustrates that shifting the application from Article 8 to Article 9 of Regulation 1/2003 is regarded as the optimal approach for the Commission, particularly in terms of resource allocation. However, this change could potentially harm interim measures, reducing their importance compared to other enforcement mechanisms. This may have motivated the European legislator to reassess these norms when incorporating them into the DMA.

– The relationship between Article 8 of Regulation 1/2003 and Article 24 of DMA

By extrapolating Article 24 of the DMA,[25] it indicates that it has the same legal structure as Article 8 of Regulation 1/2003 regarding the assessment process: prima facie findings and urgency. This is also related to the provisional, renewable, and reversible attributes of these measures. Nonetheless, three deviations are present: the evaluation of pertinent elements, the aim of enacting these measures, and the legal tools used for their implementation.

The DMA assessment pack indicates that the EU legislator has rendered the evaluation of prima facie and urgency more adaptable for applications. Demonstrating a "prima facie infringement" of Articles 5, 6, and 7 of the DMA will be unproblematic, particularly when the obligations of the gatekeeper are explicitly articulated and defined, in contrast to Article 8 of Regulation 1/2003, which necessitates a comprehensive examination of competition cases through two articles (101 and 102 TFEU).[26] These obligations are meant to target specific gatekeepers or core platform providers, consequently diminishing the necessity for context-dependent individual evaluations.

Analogous to prima facie, demonstrating "serious and irreparable damage" is also unproblematic. The effect evaluation indicates that damage is significant when the gatekeeper is larger, a scenario readily observable as markets frequently move swiftly in favour of a singular gatekeeper that possesses a distinct advantage over its rivals. Consequently, gatekeepers are well-positioned to perpetrate anticompetitive actions.

The term "irreparable damage" denotes the adverse consequences anticipated in the future, while interim remedies serve to avert the purported violation of responsibilities aimed at halting damage that cannot be rectified by a final ruling. Specific signs of this disadvantage have been noted, especially concerning previous competition procedures in which the Commission implemented interim remedies such as market departures, marginalisation, consumer unhappiness, and a reputation for inefficiency.[27]

Article 8 of Regulation 1/2003 offers direct competition protection, necessitating compliance with a broad and intricate criterion,

22 Ibid., p. 118.
23 OECD, op. Cit., p. 24.
24 Summary of Commission decision. (2020). Relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement, p. 03. OJEU C 81/9.
25 Regulation (EU). (2022). On contestable and fair markets in the digital sector. EU Parliament and the Council. OJEU L 265/1.
26 Commission staff working document. (2020). Impact assessment report, para. 13, p. 4.
27 Farinhas, C. Interim measures in digital markets, op. Cit, p. 22.

whereas Article 24 of the DMA establishes interim measures to safeguard both enterprises and end-users, delineating a straightforward threshold. These two objectives are fundamental components of core platforms, as they constitute an effective framework for the success of the gatekeeper. Mistreatment of both parties indicates a shifting power imbalance favouring the gatekeeper.

The DMA recognised the Commission's unilateral authority in its implementation, although it did not inhibit the provision of assistance to the Commission, particularly as the DMA functions as a system of ex-ante regulation, in comparison to the Regulation 1/2003 system that depends on the ex-post regulation.[28] Consequently, it is important to recognise the implicit acknowledgement of the involvement of both businesses and end users in the effective execution of Article 24 by assisting the Commission through the provision of evidence or testimony, in contrast to Article 8 of the Regulation, which unequivocally affirms the Commission's ex officio authority.

The gatekeeper's duty encompasses various legal aspects, including anticompetitive practices, unfair competition, and consumer protection issues. Article 8 of Regulation 1/2003 explicitly pertains to anticompetitive behaviour. This discrepancy arises from the Regulation's adherence to Articles 101 and 102 TFEU, in contrast to the DMA, which seeks to govern the digital market across all aspects, including preventing violations of Articles 101 and 102 TFEU.

Multiple claims pertain to the practical execution of the system within the digital market context, which is crucial because the DMA's function is limited to ex-ante regulation, while ex-post regulation falls under Regulation 1/2003.[29] However, the extent to which the formulation of Article 8 addresses the alteration of anticompetitive conduct in the market remains ambiguous.

A crucial aspect is that the Commission might mandate temporary measures through an implementing act that must be adopted following advisory procedures.[30] The transition from a decision to an implementing act is significant as it signifies a modification of the Commission's unilateral power to impose interim measures.

The Commission typically enacts such measures to ensure the consistent application of EU legislation in all member states. Unlike decisions that demonstrate the Commission's discretionary authority, the implementing act entails a cooperative procedure between the Commission and the Committee, known in this context as the "Digital Market Committee".[31]

This advisory approach entails initiating discussions on prospective provisional actions within the Committee by providing opinions without delineating a specific methodology. However, the article did not clarify if this opinion was obligatory for the Commission, although the phrase "taking utmost account of the conclusions...and of the opinion delivered",[32] demonstrates that this was not the situation. Nonetheless, this collaboration negates the "initiative" aspect present in Article 8 by rendering interim measures a collective endeavour.

The Commission has not yet enforced these remedies against gatekeepers. The Commission continues to favour pursuing promises to address competition disputes despite efforts to enhance the reliability of interim measures in the digital market. In its case against Google, the Commission determined that the corporation exploited its dominance in the AdTech industry and chose to pursue commitments rather than

28 Skara, G., Muçollari, O., Hijdini, B. (2024). Adopting the competition policy for the digital age: Assessing the EU's approach. Laws, 13(5), p. 13.

29 Farinhas, C. (2025). The Commission's evaluation of Regulation 1/2003 and Regulation 773/2004: implication for interim measures proceedings in competition law. European Competition Journal, p. 5. <https://doi.org/10.1080/17441056.2025.2499331>.

30 Regulation on contestable and fair markets in the digital sector, op. Cit, Art. 50.

31 Ibid, Art 50(1).

32 Regulation No 182/2011. (2011). Laying down the rules and general principles concerning mechanisms for control by Members States of the Commission's exercise of implementing powers. EU Parliament and Council. OJEU L 55/13, Art. 4(2).

implement interim measures.[33] This suggests the Commission's reluctance to act to prevent prolonging the procedures unnecessarily.

2. THE JUDICIAL OVERSIGHT THROUGH INTERIM RELIEFS

According to Article 279 TFEU, the European Courts possess the authority to mandate interim measures in any matter presented to them if deemed necessary. Despite the absence of a definition of those provisions, it is plain that they maintain their urgent character, as shown by the phrase Necessary interim measures. In nature, interim measures are purely procedural centralised orders, issued by the presiding judge of the pertinent court. The procedural rights of the parties are elucidated, and equitable procedures are guaranteed, rather than assigning substantive rights and obligations, as it embodies strategic methods for conflict resolution.[34] The scope of the problems addressed by these methods is extensive, including competition disputes. Nonetheless, the judicial power of the European Courts subsequently affects the execution of these proceedings from the judge's viewpoint, which is clarified as follows:

2.1 Criteria for suspending the contested act

In accordance with Article 160(1) of the Rules of Procedure of the Court of Justice[35] and Article 156(1) of the Rules of Procedure of the General Court,[36] an application for interim measures to suspend the contested act must pertain to ancillary litigation to be accepted, which means that actions for annulment and appeals are the main actions that resolve disputes on their merits. Accordingly, the necessity of interim measures becomes apparent when the appellant's interests are jeopardised by the ongoing consequences of disputed acts.[37]

European courts use the same assessment criteria as the Commission. The sole distinction is that the appellant is responsible for invoking them by demonstrating a prima facie case, urgency, and proportionality of the disputed EU action.

Farinhas asserts that a prima facie cause for judicial interim relief is formed when the circumstances present enquiries that existing case law does not definitively address, or when the applicant's arguments introduce "serious doubts" regarding legal theories affirmed in prior judgements.[38] An illustration of the latter is the IMS Health case, which exemplifies the interplay between competition law and intellectual property rights. In implementing interim remedies, the Commission based its decision on a broad reading of the Magill judgment, recognising an extraordinary case in which the refusal to licence intellectual property rights constitutes an abuse of dominance.

Through a General Court order, the corporation successfully suspended the Commission's interim decision, which the ECJ affirmed following the Commission's appeal. This fact raised doubts about the difficulty of applying interim measures when innovative approaches to Articles 101 and 102 are considered.[39]

Nonetheless, the ECJ determined that a refusal to grant a licence constitutes abuse of dominance. Nevertheless, the exercise of exclusive rights may pertain to abusive dominance, particularly when abusive conduct obstructs the introduction of a new product sought by

33 European Commission. (2025). Commission fines Google 2.95 billion euro over abusive practices in online advertising technology. Press-release. <https://ec.europa.eu>.

34 Šadl, U., Zurita, L. L., Brekke, S. A., Naurin, D. (2022). Law and order: the orders of the European court of justice as a window in the judicial process and institutional transformations. European Law Open Journal, 1(3), p. 561.

35 Rules of procedure of the Court of Justice. (2012). OJEU L 265/1.

36 Rules of procedure of the General Court. (2015). OJEU L 105/1.

37 Chocron Giraldez, A. M, op. Cit, p. 6-7.

38 Farinhas, C. Are interim measures under Regulation 1/2003 excluded in new or complex cases? op. Cit, p. 21.

39 Ibid., p. 27.

consumers.[40] This did not apply to the Commission, which failed to adhere to the stipulations of a new product, mandating IMS to compulsory licence its proprietary brick structure encompassing 1860 market segments that IMS had developed and safeguarded by copyright, to furnish analogous regional sales reports to pharmaceutical companies, contending that the industry was accustomed to this format and rejected data presented in any other manner.[41]

The Commission did not establish prima facie based on the actual facts of the case; instead, it relied on precedent without assessing the two cases' contestability. This reliance subjects the Commission's prima facie to criticism, particularly as it articulated its interim measures in a definitive manner that contradicts their temporary nature.[42] Furthermore, the Commission failed to examine the remaining two reasons, as such a licence would inflict significant and irreparable harm to IMS copyrights and alter the equilibrium between private and public interests regarding the protection of innovations.

The IMS case demonstrated the extensive discretion of the European Courts in implementing interim measures, allowing them to not only exercise judicial authority but also to establish the criteria for interim actions by the Commission. This led to a decrease in the scope of the Commission's application. Nevertheless, temporary actions under the DMA provide a novel viewpoint for achieving the objectives of both the Commission and European courts by shifting towards regulatory theory.

2.2 Transition from competition law to regulatory theory

The last case relevant to this issue was the ByteDance case in 2024.[43] Following its designation as a gatekeeper by the Commission through decision C (2023) on 5 September 2023 under the DMA, Bytedance submitted an application to the General Court for interim measures on 16 November 2023, seeking to suspend the Commission's decision owing to the assertion of serious and irreparable harm threatening its marketplace and innovation.[44] The judge of the General Court remained unconvinced and consequently rejected the request due to insufficient demonstration of urgency or prima facie evidence, wherein the applicant must establish the existence of serious and irreparable harm resulting from the contested decision that cannot await resolution until the final decision is rendered.

Bytedance's action was to assert allegations lacking prima facie infringement evidence. The main accusation was that there was a breach of confidentiality by revealing how TikTok profiles its users based on the Commission's use of Article 15 of the DMA. Nonetheless, the judge endorsed the Commission's assertion that Article 15 aims to improve transparency and clarify profiling procedures, aligning with the DMA's objective of consumer protection, while not encompassing the concept of consumer harm. This indicates that the DMA serves to enhance competition law through specific requirements.[45] Among these, privacy is highlighted by ByteDance in its assertion, as it is not regarded as a goal of competition legislation, but rather as a concern addressed by the DMA.[46]

Since Article 15 does not necessitate publication or disclosure of trade secrets, but rather offers a mere report. This does not pose a risk to ByteDance, as competitors and third parties lack access to information classified as confidential by the company.[47]

40 Ibid., p. 29.
41 Art, J. Y. (2015). Interim relief in EU competition law: A matter of relevance. Italian antitrust Review, 2(1), p. 63.
42 Ibid., p. 69.
43 Order of the president of the General Court. (2024). Case T-1077/23R Bytedance v. European Commission (interim relief). Luxemburg, paras. 2-6.
44 Ibid., para. 17.
45 Colangelo, G., Martinez, A. R. The metrics of the DMA's success. European Journal of Risk Regulation, 16(3), p. 1027.
46 Iacovides, M. C., Stylianou, K. (2024). The new goals of EU competition law: Sustainability, labour rights and privacy. European Law Open Journal, 3(3), p. 607.
47 Order of the president of the general court, op. Cit, para. 17.

This case illustrates that, while seeking interim measures in a legal setting is considered a right to trial, it does not guarantee that this right will be granted to the accused.[48] The Court highlighted that the DMA is not conventional competition legislation but a regulatory mechanism intended to impose duties on major digital platforms prior to the onset of harm.

The General Court's methodology in the Bytedance case was formalistic and threshold-oriented, utilising the regulatory framework of gatekeeper designation under the DMA. The DMA operates on assumptions and quantitative criteria, allowing minimal opportunity for platforms to contest their designation unless they present persuasive counter evidence. This signifies a distinct shift from the effects-based rationale of competition law to a rules-based regulatory paradigm.

CONCLUSION

Interim remedies are justified when there is a threat of significant and irreparable harm to competition that cannot be rectified by the decision made by the pertinent body. Failing to implement interim measures in a timely manner may negatively impact competitiveness. The Commission is tasked with executing its interim measures judgments, while the European Courts provide judicial oversight, ensuring that such circumstances do not worsen, thus affirming the dual nature of these procedures. Nevertheless, the subsequent results were derived from this research.

- The Commission does not implement interim measures efficiently, as the interaction between these measures and the assessment elements transforms their character from swift and provisional to lengthy and burdensome. The lack of an objective standard to differentiate between "serious doubts" and "mere uncertainties", coupled with the extensive spectrum of urgency and the need to balance interests, incentivises the Commission to maintain those measures in the background.
- The challenges faced by the Commission, particularly in cases such as Broadcom and Illumina/GRAIL, suggest that the application of interim measures often functions more as an extended market test than as a rapid, temporary solution. This protracted process, as evidenced by frequent recourse to commitments, indicates a divergence from the intended swiftness and provisional nature of such measures.
- The Commission's interim measures may receive minimal acknowledgement from the undertakings, as the factual and legal determinations could be predicated on erroneous evaluations or legislative deficiencies, thereby resulting in litigation before the European Courts in defence of the right to a fair trial.
- Judicial interim measures exert greater influence than those of the Commission despite the shared assessment criteria because of the extensive discretionary authority held by European Courts in their issuance. Furthermore, European courts possess greater influence over the Commission by imposing stringent criteria for adopting interim measures, which may be deemed excessive.

These conclusions necessitate legislative modifications to establish a contemporary, adaptable, and equitable framework for interim measures between the Commission and European Courts.

48 Chocron Giraldez, A. M, op. Cit, p. 137.

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Guarantees for the Protection of Constitutional Justice in Algeria: From the Constitutional Council to the Constitutional Court in a Comparative Perspective

Somia Kamel

Ph.D in Law, Professor lecture A, University of Adrar, Algeria

s_kamel@univ-adrar.edu.dz

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ABSTRACT

Constitutional justice in many countries faces multiple challenges that affect the effectiveness of constitutional oversight institutions and the extent to which the rule of law and democracy are enshrined. In this context, Algeria, influenced by the Arab Spring revolutions and following the example of some comparable constitutional systems, has sought to develop its system of constitutional justice through successive constitutional reforms, The most recent of these was the 2020 Constitution, which approved the transformation of the Constitutional Council into a Constitutional Court, to strengthen guarantees for the protection of the Constitution and expand the scope of constitutional oversight.

Despite the importance of this transformation, it was not without problems that still raise questions about its effectiveness in achieving independent and effective constitutional justice, especially in light of the continuing dominance of the executive branch and the contradictions between the consti-

tutional and regulatory provisions governing the Constitutional Court's work. Based on this, this study aims to analyse the most prominent challenges facing constitutional justice in Algeria under the new constitution, using comparative constitutional systems that have been directly or indirectly affected by the Arab Spring, to highlight similarities and differences, and assess the adequacy of the guarantees adopted. The study also seeks to present a set of practical recommendations aimed at capitalising on this constitutional gain by avoiding the criticisms previously levelled at the Constitutional Council and closing the legal loopholes that may hinder the achievement of constitutional justice in line with the requirements of the rule of law.

INTRODUCTION

Under the hierarchy of legal rules, the constitution is considered the pinnacle of the state's legal structure, as all public authorities, whether legislative, executive, or judicial, are subject to its provisions. Based on this, the importance of the bodies responsible for achieving constitutional justice is highlighted, as they are the fundamental guarantor of the supremacy of the constitutional document and are entrusted with regulating the work of constitutional institutions, establishing controls to prevent their abuse, maintaining the balance between powers, and protecting the fundamental rights and freedoms of individuals.[1] This pivotal role has led to constitutional justice being given a central place in various contemporary constitutional systems. However, the models for its organisation and mechanisms for its exercise differ from one country to another.

While some comparative constitutional experiences have tended to assign the task of reviewing the constitutionality of laws to the courts of general jurisdiction, through a mechanism of pleading unconstitutionality and making the Supreme Court or Constitutional Court the final authority in determining the constitutionality of laws,[2] other experiences have adopted the model of the Constitutional Council, as was the case in Algeria and several countries with French influence. In contrast, many constitutional systems have adopted the model of an independent constitutional court with expanded powers, considering it more appropriate for strengthening the independence of the constitutional judiciary and enshrining the protection of rights and freedoms, an approach enshrined in the 2020 Constitution of the Republic of Algeria.[3]

This shift has resulted in the upgrading of the constitutional judiciary in Algeria from a constitutional council to a constitutional court. This development is not limited to formal or terminological aspects, but also extends to the expansion of the constitutional body's powers, as its role is no longer confined to reviewing the constitutionality of laws, but also includes

1 Cardenas Gonzales, J. R. (2025). The Legislative Function of The Constitutional Court in Relation to the Omission of the Constituent. Constitutional Review, Vol. 11, Number 1, pp. 63-64. <https://doi.org/10.31078/consrev1113>.

2 Epstein, L., Shvetsova, O., and Knight, J. (2024). The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government. Law & Society Review, Vol. 35, Issue 1, p. 118. <https://doi.org/10.2307/3185388>.

3 Khane, F., Mecheri, D. (2025). The constitutional court of Algeria between necessity and tradition. Russian Law Journal, Vol. 13 No. 01, p. 1503.

constitutional control and advisory functions, similar to practices in some comparative constitutional systems. However, despite their positive implications, the new provisions governing the Constitutional Court are not without certain shortcomings, which raise questions about its actual ability to achieve constitutional justice in Algeria.

On this basis, this study raises several fundamental questions, most notably whether the legal provisions established to regulate the Constitutional Court under the 2020 amendment constitute guarantees for the protection of constitutional justice, and the extent to which the constitutional founder has responded to the criticisms levelled at the Constitutional Council system in the 2016 Constitution, in light of some comparative constitutional experiences.

This study is critical because it deals with a pivotal constitutional institution to which the constitutional founder devoted an entire chapter in Title IV, entitled 'Oversight Institutions', dedicated to defining the Constitutional Court, explaining its structure, working mechanisms and powers, which requires providing adequate guarantees for its independence and enabling it to fulfil its role in protecting constitutional justice and consolidating the rule of law. In this context, this research paper seeks to identify the most critical challenges facing the Constitutional Court in Algeria under the current constitution and to analyse their implications for the effectiveness of the constitutional justice system, drawing on relevant comparative experiences.

METHODOLOGY

This study is based primarily on a descriptive and analytical approach, describing and analysing the constitutional and legal framework of the constitutional justice system in Algeria through two main stages: the Constitutional Council stage and the Constitutional Court stage, with a description of the powers of each, their composition, their working mechanisms, and the extent to which this contributes to the consolidation and protection of constitutional justice.

The study also employs a historical approach by tracing the emergence and development of the constitutional justice system in Algeria and examining the various constitutional stages it has gone through, from the establishment of the Constitutional Council in previous constitutions to the creation of the Constitutional Court in the 2020 Constitution, The aim is to understand the political and constitutional background that led to this transformation and to explain its justifications and implications.

The study also makes partial and supporting use of the comparative approach, referring to some comparative constitutional experiences in several countries with similar political environments, to highlight similarities and differences and to clarify the extent to which Algerian constitutional legislators were influenced by or benefited from these experiences, without seeking to make a comprehensive comparison between constitutional systems.

Finally, the study relies on a deductive approach in analysing jurisprudential opinions and jurisprudence related to constitutional justice, to draw general conclusions and assess the effectiveness of the guarantees adopted to protect constitutional justice in Algeria.

1. CHALLENGES TO CONSTITUTIONAL JUSTICE LINKED TO EXECUTIVE BRANCH DOMINANCE

The achievement of effective constitutional justice remains closely linked to respect for the principle of separation of powers,[4] which is often challenged by the growing pre-eminence of the executive branch over the legislative and

4 Abdellaoui, S., Zouagri, T. et al. (2025). The oversight role of the constitutional court in Algeria. Lex localis – Journal of Local Self-Government, Vol. 23 No. 11, p. 1710. Doi:10.52152/sb70y652.

judicial branches.[5] In Algeria, the 2020 Constitution reflects a desire to move towards greater judicial oversight, in a context marked by the Hirak citizens' protests and the search for more transparent governance. The Constitutional Court, enshrined in Article 185 and presented as an independent institution under the control bodies, is part of this dynamic. However, a key question remains: is this proclaimed independence truly and effectively reflected in practice?

1.1 Organic autonomy of the Constitutional Control Authority

During the 2016 constitutional revision, the Constitution's drafters established a hybrid composition for the Constitutional Council, combining appointment and election. This body comprised twelve members: four appointed by the President of the Republic (including the President and Vice-President of the Council), two elected from among the members of the Supreme Court, two from among the members of the Council of State, two from among the members of the Council of the Nation, and two from among the members of the National People's Assembly.[6] However, as the members of the Supreme Court and the Council of State were themselves magistrates appointed by the President of the Republic, this meant that eight members were directly or indirectly appointed by the President, compared with only four elected members. Furthermore, there was no guarantee that the elected members had proven expertise in constitutional law, raising questions about the technical competence and specialisation required to perform such sensitive functions.

Conversely, although the 2020 Constitution maintained the number of members of the Constitutional Court at twelve,[7] it introduced a new composition based on a combination of appointment and election. Four members are appointed by the President of the Republic, including the President of the Court, for a single six-year term. One member is elected from among the judges of the Supreme Court and another from among the members of the Council of State, who are initially magistrates appointed by the President.[8] The remaining six members, representing half of the Court's composition, are elected by universal suffrage from among professors of constitutional law.

Thus, the number of members directly or indirectly appointed by the President has been reduced from eight to six, while six other elected members specialise in constitutional law. This development constitutes a significant step forward for the constituent assembly, favour-

5 The current Algerian Constitution pays particular attention to the executive branch, to which it devotes two separate chapters: one relating to the President of the Republic and the other to the Government. This structure is a departure from previous constitutions, in which the three branches of government were grouped together in a single chapter, with each branch receiving specific treatment within that chapter. This formal imbalance between the branches of government is also reflected in substantive terms: the executive branch appears to be largely privileged, particularly with regard to the prerogatives of the President of the Republic. The latter is granted numerous powers affecting the legislative and judicial spheres, including: the power to legislate by decree, the possibility of dissolving the National People's Assembly and appointing one third of the members of the Council of the Nation, the right to raise objections to laws and request a second reading, and the appointment of the Chief Justice of the Supreme Court and the President of the Council of State. In addition, he serves as President of the High Council of the Judiciary and has other important prerogatives, reflecting a considerable strengthening of the executive branch at the expense of the other branches of government.

6 Article 183 of the 2016 constitutional amendment, published pursuant to the Algerian law No. 16-01 of March 6, 2016 (Official Gazette No. 14 of March 7, 2016).

7 Algeria 2020 Constitution, adopted by popular referendum on 1 November 2020 (Official Gazette of Algeria No. 82 of 30 December 2020), Article 186.

8 The article 92 of Algeria 2020 Constitution above mentioned ,as well as Algerian internal regulation of the Council of State (Official Gazette of Algeria No. 66 of 27 October 2019) and the Algerian internal regulation of the Supreme Court (Official Gazette of Algeria No. 34 of 16 June 2014), determine how these judges are appointed and elected.

ing the consolidation of constitutional justice. However, it is not sufficient to exclude all influence from the executive branch, raising the question of the Court's organic independence, especially since its decisions are taken by a majority of the members present and, in the event of a tie, the President . appointed by the Head of State . has the casting vote,[9] except in matters of organic laws.

To enshrine the independence of this Court, as provided for in Article 185 of the 2020 constitutional revision, Article 187 emphasises that its members must not belong to any political party. However, the legislator has not specified the nature of this affiliation or its terms and conditions. It would therefore be more appropriate to apply, by analogy, the provisions relating to members of the Independent National Electoral Authority,[10] which require them to have had no political affiliation for a minimum period of five years.[11]

It should also be noted that the position of vice-president, established during the 2016 constitutional revision, has been abolished, as it has not been filled during the entire period of activity of the Constitutional Council.[12] Similarly, the participation of representatives of the National People's Assembly and the Council of the Nation (two members from each chamber) has been abandoned to preserve the Court's independence from political influence and to avoid any situation in which it would find itself both judge and party.[13]

Among the elements considered favourable to constitutional justice and indicative of a political will to endow the Constitutional Court with genuine independence is the election of six of its members from among professors of constitutional law.[14] These professors must be highly qualified, a requirement that also applies to members appointed by the President of the Republic, and must have training in constitutional law . the nature and duration of which are not specified . as well as at least 20 years of legal experience, compared to 15 years previously.[15] Nevertheless, it appears that this training requirement mainly concerns the four members appointed by the President, as professors of constitutional law are not subject to it. Presidential Decree No. 21-304[16] requires the latter to have been professors specialising in constitutional law for at least five years, to hold the rank of full professor, and to have made a significant scientific contribution in this field.

This situation highlights an inequality in the application of the conditions of competence between elected professors and appointed members, with a distinction being made between simple legal training and teaching and research activities, especially since the presence of ambiguous and sometimes contradictory constitutional provisions makes the interpretation of the constitutional text particularly complex. Finally, although these professors enjoy independence in principle due to

9 Algeria 2020 Constitution, Article 197.

10 Mardassi, M., Saleh, A. N. (2023). The composition of the Constitutional Court between independence and subordination. Numeros Academic Journal, 04(01), p. 119.

11 Algerian organic law No. 19-07 of 14 September 2019 on the Independent National Electoral Authority (Official Gazette of Algeria No. 55 of 15 September 2019), Article 19.

12 In the event of the resignation, death, or permanent incapacity of the President of the Constitutional Court, the Court convenes under the chairmanship of its most senior member to fill the vacancy. The President of the Republic is immediately informed, and a replacement is appointed within fifteen days preceding the end of the term. See Articles 6 and 7 of the Algerian internal regulation of the Constitutional Council (Official Gazette of Algeria No. 75 of 13 November 2022).

13 Lasledj, N. (2024). From the Constitutional Council to the Constitutional Court in Algeria: A Change in Names or the Establishment of an Effective Constitutional Model? Arab Organization for Constitutional Law, Eighth Session, 2024, pp. 8-9.

14 Akrour, M. (2022). University Professors as Members of the Constitutional Court, Professor Researcher Journal for Legal Studies, 07(02), p. 1942.

15 Algeria 2020 Constitutional, above mentioned, Article 187 (para. 2).

16 Algerian Presidential Decree 21-304 of 4 August 2021, specifying the conditions and procedures for the election of professors of constitutional law as members of the Constitutional Court (Official Gazette No. 60 of 5 August 2021).

the way they are appointed .they are elected by their peers within public law faculties. the fact that the decree setting the conditions for their election is issued by the executive branch, represented by the President of the Republic, raises questions about the effectiveness of this independence.[17]

1.2 Proof of Impeachment and Vacancy in the Office of the Presidium of the Republic

Article 102 of the 2016 constitutional revision, relating to the role of the Constitutional Council in determining the incapacity and vacancy of the Presidency of the Republic, has been strongly criticised, particularly during the crisis that Algeria experienced during the illness of former President Abdelaziz Bouteflika. This criticism intensified at the end of his fourth term, when certain parties attempted to exploit the situation to allow him to run for a fifth term despite his obvious incapacity. Without the intervention of the popular movement, the former president would probably have continued to exercise his functions for a new term, exposing the country to a deep and dangerous political crisis.[18]

Admittedly, this article stipulates that the Constitutional Council must meet when the President is unable to perform his duties due to serious and lasting illness, verify this incapacity by all appropriate means, and unanimously propose to Parliament that it be recognised. Parliament, meeting in joint session, must then declare the incapacity by a two-thirds majority and instruct the President of the Council of the Nation to act as interim president for a period of 45 days. However, despite the president's state of health, his prolonged absence from public life, and the exploitation of his position by certain political actors, the Constitutional Council has been unable to meet. The authorities remained inflexible, despite insistent calls from the popular movement, the opposition, the media, and several political groups.

In the current Constitution, the content of the article has been retained,[19] but certain editorial and procedural changes have been introduced. Thus, the phrase 'the meeting is mandatory' has been replaced by the expression 'the Constitutional Court shall meet automatically and without delay', while the required voting percentage has been changed as follows: 'on the proposal of the Court, adopted by a three-quarters majority of its members, Parliament must declare the impediment'. However, these new provisions do not appear to substantially alter the situation, as the Court can only meet when convened by its president, who is himself appointed, de facto, by the President of the Republic. Out of loyalty, or at least reserve, the latter may be reluctant to initiate a meeting to examine such a question.

It would therefore have been appropriate to remove this obstacle by granting the bodies responsible for notification . in particular the members of the opposition within the National People's Assembly .the right to refer the matter to the Court by means of a letter containing a decision or finding relating to the President's state of health or the occurrence of an impediment preventing him from exercising his functions. Furthermore, the wording of the provision could be improved to provide that the Court shall meet either automatically by virtue of the law or upon notification by the competent bodies. Such wording would cover all situations that may require the Court's intervention in this area.

17 Ziani, K., Drid, K. (2022). The Composition of the Constitutional Court between Independence and Subordination. Al-Bahith Journal for Academic Studies, 07(02), University of Hadj Lakhdar, Batna, Algeria, p. 619.

18 Boumediene, M. (2022).The Methodology of the 2020 Algerian Constitution in Organizing the Constitutional Court and its Shortcomings. Al-Haqiqa Journal for Social and Human Sciences, 22(02), University of Hadj Lakhdar, Batna, Algeria, p. 616.

19 Algeria 2020 Constitution, above mentioned, Article 94.

1.3 Pre-eminence of the President's power in matters of compulsory referral

There is no doubt that the Algerian Constitutional Council, established by the 2016 constitutional reform, was largely modelled on the French system. Like the French Constitutional Council, it was granted broad powers and a wide range of competences.[20] However, this expansion of powers was accompanied by a strengthening of the role of referral by the President of the Republic, to the detriment of other authorised bodies. Indeed, the Constitutional Court only exercises its powers following a mandatory referral by the President of the Republic, both in the context of compliance review and mandatory review. The latter remains the constitutionally competent body to refer matters to the Court concerning organic laws[21] and the conformity of the internal regulations of the two chambers of Parliament.[22] Furthermore, the 2020 Constitution requires the President of the Republic to submit to the Constitutional Court, at the end of a state of emergency, the ordinances issued during parliamentary recesses or in the event of a vacancy in the National People's Assembly,[23] as well as those adopted during the state of emergency,[24] it being understood that the extension of the state of emergency can only take place with the approval of a majority of the members of both houses of Parliament meeting together.[25]

Regarding other authorities empowered to refer cases to the Court, discretionary referral rights have been granted to the President of the National People's Assembly, the President of the Council of the Nation, the Prime Minister or the Head of Government, as applicable. It is also granted to forty members of the Chamber of Deputies or twenty-five members of the Council of the Nation[26] instead of fifty members of the Chamber of Deputies and thirty members of the Council of the Nation in the 2016 constitutional revision[27] for disputes that may arise between constitutional authorities or for the interpretation of the provisions of the Constitution, when the Court is called upon to give an opinion on them. It should be noted that the President of the Republic also has the power to refer matters to the Court in these areas.

There is no doubt that the openness of the drafters of the Algerian Constitution to the rights of the parliamentary opposition since the 2016 constitutional revision, reinforced by the 2020 constitution, which recognises the right of parliamentarians . in particular those in the opposition. to refer matters to the Constitutional Court,[28] constitutes a significant step towards consolidating the principles of a genuine democracy based on the recognition of the rights of political minorities.[29] This development is also likely to improve relations between the majority and the opposition. However, in practice, in the three years following the creation of the Constitutional Court (2021–2023), the power of referral exercised by the President of the Republic has largely prevailed over others in terms of monitoring and enforcing the Constitution, accounting for more than 70% of referrals, com-

20 Ben Ali, Z. (2021). The creation of the Constitutional Court instead of the Constitutional Council in Algeria. Algerian Journal of Legal and Political Sciences, 58 (04), p. 311.

21 Algeria 2016 Constitutional Amendment, above mentioned, Article 186 (para. 1), Algeria 2020 Constitution, above mentioned, Article 190 (para. 2).

22 Algeria 2016 Constitutional Amendment , above mentioned, Article 186 (para. 3), Algeria 2020 Constitution, above mentioned, Article 190 (para. 6).

23 Algeria 2020 Constitution, above mentioned, Article 142.

24 Ibid., Article 98 (para. 07).

25 Ibid., Article 98.

26 Ibid., Article 193.

27 Algeria 2016 Constitutional Amendment, above mentioned, Article 187 (para. 2).

28 Algeria 2016 Constitutional Amendment, above mentioned, Article 116 (para. 5).

29 The parliamentary opposition has the right to refer matters to the Constitutional Court, but the conditions attached to this right make it difficult to exercise, particularly with regard to obtaining the quorum required to initiate a notification procedure and the time limit, which must be a maximum of 30 days before publication. Furthermore, there are few cases in which parliamentarians can exercise this right.

pared to 27% for those from parliamentarians.[30] In any event, whether mandatory or optional, referral remains a prerequisite for the Court to intervene, as it does not exercise its powers automatically by self-referral, unlike the former Constitutional Council, which is a point often criticised by legal scholars.

1.4 Establishment and amendment of the regulation governing the functioning of the Constitutional Court

One key question about the independence of the constitutional review body is how its rules of procedure are made and who's in charge of doing that. On this point, the last paragraph of Article 185 of the 2020 Constitution gives the Constitutional Court the power to set its own rules of procedure. However, no quorum has been provided for the meeting of the Court responsible for drafting them, no specific voting rules have been defined, and their adoption is not subject to any particular conditions of form or substance. The Court thus enjoys almost absolute freedom in this regard. This legal loophole allowed the former Constitutional Council to draw up its rules of procedure in order to comply with the new constitutional revision,[31] even before its membership reached the required number.[32] It adopted the rules when it had only nine members, even though the new rules of procedure require at least ten members to be present for a meeting to be valid.

Regarding the power to amend, Article 99 of the Regulation governing the functioning of the Constitutional Court[33] stipulates that amendments to the provisions relating to the functioning of the Court may be proposed either by its President or at the request of a majority of its members. However, the fact that the President of the Court is appointed by the President of the Republic and not elected by his peers may suggest a pre-eminence of the executive branch, which could influence the Court and prevent it to propose amendments to its rules in a manner favourable to its own interests. On the other hand, the power granted to the majority of the Court's members to also propose amendments constitutes an element of institutional balance, even if the lack of precision regarding the nature of this majority may also reflect a desire for procedural flexibility. In any case, no amendments have been made to the rules of procedure of the Constitutional Council to date.[34]

2 . OTHER LIMITATIONS AND OBSTACLES HINDERING THE DEVELOPMENT OF GENUINE CONSTITUTIONAL JUSTICE

Constitutions, as the supreme legal norms of the state, are much more complex to draft than ordinary legislative texts, which gives the body responsible for drafting them a special responsibility. Consequently, the method of constitutional drafting must be based on fundamental rules such as clarity, precision, and consistency, to avoid any form of contradiction, conflict of interpretation, or unnecessary repetition. However, these requirements have not always been

30 Statistics of the Constitutional Court. <https://cour-constitutionnelle.dz/ar/%d8%a7%d9%84% d8%b1%d8%a6%d9%8a%d8%b3%d9%8a%d8%a9> (Last access: 16.12.2025).

31 The composition of the Constitutional Council was finalized in July 2016 under Algerian presidential decree No. 16-210 of 27 July 2016 on the publication of the nominal composition of the Constitutional Council (Official Gazette of Algeria No. 45, dated 31 July 2016).

32 It should be noted that the Constitutional Council did not rely on the provisions of the first paragraph of Article 214 of Algerian presidential decree No. 16-210 above mentioned, on the publication of the nominal composition of the aforementioned Constitutional Council, which stipulates that "the Constitutional Council continues with its current representation in the exercise of the powers conferred upon it by the Constitution...".

33 Algerian regulation governing the functioning of the Constitutional Court (Official Gazette of Algeria No.04 of 22 January 2023).

34 Algerian regulation governing the functioning of the Constitutional Council (Official Gazette of Algeria No. 42 of 30 June 2019), Article 102.

fully respected by the Constituent Assembly, which has given rise to extensive doctrinal and jurisprudential debates on many constitutional provisions.

2.1 Dualism in the Constitutional Court regulation

Although all previous Algerian constitutions affirmed the Constitutional Council's right to establish its own internal regulation, the 2020 constitution conferred on the Constitutional Court, in addition to the power to establish its own regulation determining the rules governing its functioning[35] – a power not granted to any other constitutional branch[36] – the power to establish its own internal regulation.[37] So what is the difference between the internal regulation of the Constitutional Court and the regulation that determines the rules governing its functioning?

Clearly, the issue raised by the 2020 constitutional reform lies in the dual interpretation of the rules: one concerning the rules of procedure of the Constitutional Court and the other concerning its rules that set its rules. Therefore, while it is legally logical for the Constitution to confer on the Court the right to establish its own rules of procedure. So is it legally logical to confer on it the power to establish legal rules? That is, to replace Parliament in defining all matters within its jurisdiction towards other constitutional authorities and institutions? And to unilaterally establish legal rules that necessarily affect other authorities and institutions?

This undoubtedly constitutes a clear contradiction with the principle of the division of powers between constitutional authorities and institutions. The Constitutional Council itself has often emphasised this point in its opinions and decisions. For example, in its opinion issued at the end of 2018 on the constitutionality of the organic law establishing the Algerian Academy of the Amazigh Language, it stated that 'while the Academy may specify, in its internal regulations, other procedures necessary for its functioning, it must, when drafting this text, refrain from including matters requiring the intervention of other institutions and falling within the scope of the organic law, in accordance with the constitutional principle of the division of powers'.[38] Thus, it appears that the committee responsible for drafting the Constitution, perhaps inadvertently, inserted the issue of the Court's internal regulations, while forgetting that it had retained, as in previous constitutions, the provision relating to its functioning regulation.

Legal methodology does not allow the combination of the two, as they are two similar internal regulations. If the regulation governing the rules of the court is considered to be a law, this is another error committed by the committee. Legislation is the domain of Parliament, in the form of ordinary or organic law, and it is the latter that the committee should have adopted, stipulating a reference from the Constitution in Article 185 so that an organic law determines the rules of procedure of the Constitutional Court, or that this organic law is merged with the organic law stipulated in Article 196 relating

35 Algeria 2020 Constitution, above mentioned , Article 185 (para. 3).

36 Even Parliament, representing the will of the people, is required to submit internal regulation of each chamber to the Constitutional Court for a ruling on their constitutionality. Furthermore, any amendment to these regulations, even if it concerns only a single article, must be submitted to the Constitutional Court for verification of its constitutionality. This is a rigorous control process, distinct in both form and substance from constitutional review. For more details, see: Boumedienne , M. (2020). Notification as a key formal criterion for distinguishing between conformity review, constitutional review and review of constitutionality exceptions under the 2016 constitutional reform. Revue des sciences juridiques et sociales, Ziane Achour University of Djelfa, vol. 5, no. 2, pp. 113-138.

37 Algeria 2020 Constitution above mentioned , refers to the Court's internal regulation, in accordance with Articles 188 and 189, concerning the organisation of the partial renewal of the members of the Constitutional Court and the lifting of their immunity.

38 Opinion No. 04 of the Constitutional Court, issued on 2 August 2018, concerning the review of the constitutionality of the organic law relating to the Algerian Academy of the Amazigh Language (Official Gazette of Algeria No. 54 of 5 September 2018).

to procedures and methods of notification and referral, given the inadequacy of the latter to form a single organic law bringing together all these provisions.[39]

2.2 Legal classification of the regulation governing the functioning of the Constitutional Court

In light of the provisions of the Court's internal regulation and regulations governing its functioning, it appears that the latter is nothing more than an internal regulation whose rules and provisions apply not only to its members, but also to the Court itself in the exercise of its constitutional powers.[40] Whether in matters of reviewing the constitutionality of laws, ruling on appeals, proclaiming the final results of presidential and legislative elections and referendums, or in certain specific cases, this system incorporates most of the provisions of Organic law No. 22-19,[41] as well as the Court's powers in electoral and referendum matters set out in Ordinance No. 21-01 relating to the Organic Law on the Electoral System,[42] in addition to certain provisions of its own internal regulation.

However, this regulation has been criticised because, instead of interpreting or detailing the constitutional text in the event of a contradiction with another text, it has limited itself to summarising its provisions. This can be explained by the fear of making a mistake or coming into conflict with the constitutional text, especially since the latter contains certain contradictions, particularly concerning the effect of the review of ordinances: Article 198 of the constitutional reform subjects them to a posteriori review, while Article 142 subjects them to prior review. Thus, the wording of Article 4 of the system defining the rules of operation of this Court remains general and merely summarises, in a single article, all the legal texts subject to constitutional review.

In addition, this regulation has several shortcomings, such as the Constitutional Court's non-compliance with the methodology followed in Organic law No. 22-19 during its drafting, which led to several errors in its provisions. These include the lack of distinction between constitutional review and compliance review, which constitutes a violation of the Constitution itself, as well as the lack of distinction between the Court's sessions relating to compliance review, constitutional review, dispute resolution, and interpretation of the Constitution, and those relating to exceptions of unconstitutionality, which require publicity and the guarantees of judicial procedure.

2.3 Nature of the control exercised over the legislative ordinances of the President of the Republic

The constitutionality review of ordinances is governed by Articles 98, 142, and 198 of the 2020 Constitution. However, these articles contain numerous contradictions, particularly with regard to the nature of the review to which these ordinances are subject. Article 198 of the Constitution, which forms the legal basis for the effect of Constitutional Court rulings on the constitutionality of laws, states that the review of ordinances is retrospective, as indicated in the following sentence: 'If the Constitutional Court declares an ordinance or regulation unconstitutional, that text shall cease to have effect from the date of the Constitutional Court's rul-

39 Boumediene, M. (2023).The Constitutional and Legal Basis of the Legal Texts Regulating the Algerian Constitutional Court. African Journal of Legal and Political Studies, Ahmed Draia University of Adrar, Algeria, 07(01), pp. 28-29.

40 Boumediene, M. (2023). The Methodology of the Algerian Constitution of 2020 in Organizing the Constitutional Court and its Shortcomings, op.cit, p. 604.

41 Algerian organic law No. 22-19 of 25 July 2022 establishing the procedures for notification and referral to the Constitutional Court (Official Gazette of Algeria No. 51 of 31 July 2022).

42 Algerian law No. 21-01 of 10 March 2021 amending and supplementing the Organic Law on the electoral system (Official Gazette of Algeria No. 17 of 10 March 2021).

ing', Article 142 of the Constitution refers to the right of the President of the Republic to issue decrees in urgent cases when the National People's Assembly is not in session or during parliamentary recesses, provided that he informs the Constitutional Court. Although it mentions the review to which these decrees are subject by the Court, it does not explicitly specify the nature of this review. However, this is likely to be a prior review, given that this article stipulates that such a review is carried out by mandatory referral to the President of the Republic and that the Constitutional Court must render its decision within a maximum of 10 days. This confirms that it is indeed a prior review.

Article 98 of the Constitution establishes a posteriori constitutional review when the President of the Republic submits his ordinances to the Constitutional Court for its opinion.[43] It is clear from this provision that ordinances issued during a state of emergency are subject to such review, as the constitutional text is explicit on this point. Indeed, the article specifies that "the President of the Republic, after the lifting of the state of emergency, shall submit to the Constitutional Court the ordinances issued during it for its opinion". Consequently, ordinances adopted during a state of emergency are subject to a posteriori constitutional review, in the same manner as those adopted under normal circumstances.

This practice has moreover been confirmed when, on July 26, 2022, the President of the Republic referred the ordinance enacting the supplementary budget law for 2022 to the Constitutional Court. In its decision rendered on July 28, the Court declared these provisions constitutional.[44] Therefore, the persistent contradiction regarding the nature of the control applicable to legislative orders necessitates clarifying the terminology used, harmonizing the organization of the texts, and ensuring greater consistency between constitutional provisions, in order to facilitate their understanding for both members of the Court and the citizen.

2.4 The binding nature of decisions, opinions, and declarations issued by the Constitution Court

The legal redaction of the Constitution is vitally important, insofar as the terms used constitute the body of the legal text, while their linguistic meaning represents its soul, the source of its normative force and effectiveness.[45] Therefore, rigorous constitutional redaction requires solid linguistic mastery, in-depth legal specialisation, and serious practice. However, the text of the 2020 Constitution has several shortcomings. The wording adopted in the Algerian constitutional revisions often remains vague and imprecise, contrary to the principle of legal certainty expressly enshrined in the current Constitution in its preamble and reaffirmed in Article 34. This imprecision also compromises the stability of institutions and society and reveals a failure to consider the lessons learned from previous constitutional experiences. The 1989[46] and 1996[47] Constitutions, as well as the 2016 constitutional revision, clearly distinguished between opinions and decisions, based on the difference between prior review

43 Although Article 98 of Algeria 2020 Constitution above mentioned , refers to them as 'decisions', it is intended to refer to 'ordinances', which is considered a mistake in wording.

44 Decision No. 05 issued on July 28, 2022, concerning the constitutional review of the order containing the supplementary finance law for the year 2022 (Official Gazette of Algeria, No. 53, dated August 4, 2022).

45 Ramdani, F. Z. (2020). The Algerian Constitutional Amendment Project for the Year 2020. Kuwait International Law School Journal, 08(04), p. 572.

46 Algeria 1989 Constitution, adopted by referendum on 23 February 1989 (Official Gazette of Algeria No. 9 of 1 March 1989).

47 Algeria 1996 Constitution, adopted by referendum on 28 November 1996 (Official Gazette of Algeria No. 76 of 8 December 1996), amended by Law No. 02-03 of 10 April 2002 (Official Gazette of Algeria No. 25 of 14 April 2002), Law No. 08-19 of 15 November 2008 (Official Journal No. 16 of 16 November 2008) and Law No. 16-01 of 6 March 2016 (Official Gazette of Algeria No. 14 of 7 March 2016) and Algerian law No. 16-01, above mentioned.

exercised through opinions and ex post review exercised through decisions, while specifying, in Article 191 of the 2016 Constitution, the binding and definitive nature of both opinions and decisions. In these circumstances, on what basis did the drafting committee for the 2020 Constitution introduce a distinction between opinions, decisions, and declarations, even though decisions remain the norm in most Constitutional Court rulings, with no clear distinction between prior review and ex post review? If the Court rules on the compatibility of laws and regulations with treaties, on the conformity of the internal regulations of the two chambers of Parliament[48] with the Constitution, while giving an opinion on the interpretation of one or more constitutional provisions[49] and proclaiming the final results of presidential, legislative and referendum elections,[50] does this mean that the decision is binding, that the opinion is merely an opinion, and that the declaration has no binding effect?

The last paragraph of Article 198 of the Constitution expressly stipulates that 'the decisions of the Constitutional Court are final and binding on all public, administrative and judicial authorities', without, however, mentioning its opinions and declarations. This omission must be corrected during a future constitutional revision. How can an article that constitutes the constitutional basis for the enforcement of the Court's judgments be limited to enshrining the binding nature of decisions alone, without mentioning the scope of the opinions and declarations of the Constitutional Court?[51] It would indeed be illogical for the final and binding nature to be restricted exclusively to decisions, without also including opinions and declarations. Consequently, this article must be amended to specify that the decisions, opinions, and declarations of the Constitutional Court are final and binding on all public authorities, especially since they emanate from a court and not from a mere advisory body. Furthermore, it would be desirable to standardise the acts of the Constitutional Court in the form of decisions and, consequently, to revise all relevant provisions so that the Court only issues decisions.

3. GUARANTEES FOR THE PROTECTION OF CONSTITUTIONAL JUSTICE IN LIGHT OF THE TRANSITION FROM CONSTITUTIONAL COUNCILS TO CONSTITUTIONAL COURTS IN CERTAIN COMPARATIVE CONSTITUTIONAL SYSTEMS

The political transformations in the Middle East and North Africa since 2011 have marked a decisive turning point in the rebuilding of constitutional systems.[52] The wave of widespread protests that accompanied what has come to be known as the 'Arab Spring'[53] prompted several countries, such as Tunisia, Morocco, and Algeria, as mentioned above, to adopt far-reaching constitutional reforms aimed primarily at strengthening the rule of law.

In this context, there has been a trend towards restructuring constitutional oversight institutions by moving from a constitutional council model to a constitutional court model, which is considered a more advanced mechanism for ensuring the supremacy of the constitution. However, this shift raises a fundamental question: Does this transition reflect a genuine shift towards strengthening constitutional justice, or is it merely an institutional adjustment that has

48 Algeria 2020 Constitution, above mentioned, Article 190.

49 Ibid., Article 192.

50 Ibid., Article 191.

51 Boumediene, M. (2022). The Methodology of the Algerian Constitution of 2020 in Organizing the Constitutional Court and its Shortcomings, op.cit, p. 610.

52 Turner, C. (2015). Transitional constitutionalism and the case of the arab spring. International & Comparative Law Quarterly, Vol. 64 , Issue 2, p. 267. <https://doi.org/10.1017/S0020589315000020>.

53 Kirchoff-Foster, D. (2021). Constitutional Court Landscape Post-Arab Spring: A Survey of Design. Indiana Journal of Constitutional Design: Vol. 8, Article 2. <https://www.repository.law.indiana.edu/ijcd/vol8/iss1/2> (Last access: 02.02.2025).

not been accompanied by real progress in guaranteeing independence and effectiveness?

After discussing the Algerian experience, the Moroccan and Tunisian experiences emerge as important models for studying the limits and potential of this transition.

3.1 Morocco

In the wake of the Arab Spring, Morocco embarked on a comprehensive constitutional reform aimed at strengthening human rights, establishing the principle of separation of powers, and consolidating the rule of law. King Mohammed VI's 9 March 2011 speech, in which he announced the constitutional amendment, paved the way for a new constitutional system that reconciles tradition and modernity. The constitution adopted on 29 July 2011 represents a genuine transformation of the legal and political system, announcing a comprehensive set of reforms. About the Moroccan model of constitutional justice, Morocco has not deviated from the long evolutionary process experienced by most countries that were colonised or placed under a French protectorate, through the gradual establishment of the institution of constitutional justice, which began with the 1908 draft constitution.

3.1.1 Before the Arab Spring revolution of 2011: Limited oversight and weak safeguards

The first draft of the constitution in 1908 referred to the need for oversight of laws exercised by the Council of Elders,[54] which was transferred to the 1962 constitution[55] and initially took the form of a provisional constitutional committee before becoming the Constitutional Chamber of the Supreme Council, established in 1957, which was concerned only with "constitutional oversight of regulatory texts and the internal rules of the chambers, and in particular with examining electoral disputes and referendum processes.

However, due to its weak position[56] and the legal mechanisms available to the Constitutional Chamber, and consequently the absence of decisive and influential decisions, this institution appeared cautious and peaceful.[57] Such difficulties and problems accompanying the work of the 'chamber', such as its lack of jurisdiction at this stage to monitor ordinary laws, will prompt the Constitution 1992 to abolish it and replace it with the 'Constitutional Council', which is similar in jurisdiction to the French Constitutional Council.[58] Thus, after being confirmed in the 1996 Constitution, the Moroccan Constitutional Council,[59] occupies 'fourth place in the hierarchy of constitutional institutions', as an 'independent body' from the ordinary judiciary, enjoying, in addition to the previous powers of the Chamber, for the first time, 'the power of constitutional oversight of ordinary laws', which is considered a key power of any constitutional judiciary.[60] This independence is reflected in the Constitution itself, which devotes a separate

54 Bernoussi, N. (2017). The 2011 Constitution and the Constitutional Judge under the direction of international studies. The 2011 Moroccan Constitution: Analyses and Comments: L.G.D.J/ Extenso edition, p. 210.

55 Chapter 10, Article 100 of the Moroccan 1962 Constitution.

56 The Constitutional Chamber is mentioned in Chapter 10, Title X of the Constitution. Its late appearance in the constitutional architecture is symbolic of the place assigned to this institution within the Moroccan political system, compared to the position of bodies responsible for reviewing the constitutionality of laws in democratic constitutions.

57 There are no guarantees of independence in its work, as it lacks independence at the administrative, organisational, and financial levels. It is linked to the judiciary (the Supreme Council) and is one of its chambers. It also lacks adequate guarantees of the independence of its members, given that its president is the president of the Supreme Council, and that its members' terms are short and renewable, which leads to fears that members may act according to the whims of the executive branch, which has the power to influence their continued membership.

58 Menouni, A. L. (1999). The Experience of the Moroccan Constitutional Council. The Constitutions of Arab Countries, Proceedings of the 1998 Beirut Symposium, Brussels, Bruylant, p. 273.

59 Article 78 and seq. of the Morocco 1996 Constitution.

60 Brown, N. J., Waller, J. G. (2016). Constitutional courts and political uncertainty: Constitutional ruptures and the rule of judges. International Journal of Constitutional Law, Volume 14, Issue 4, p. 818.

section to constitutional justice, distinct from the section devoted to ordinary justice. On the one hand, this independence is also reflected at the administrative and financial level of the Council, where we find that "the administrative interests and powers of the Council are determined by a decision of the President of the Constitutional Council[61] and that 'the President of the Council is the authorising officer and may appoint the Secretary-General as authorising officer in accordance with the procedures and conditions laid down in the laws and regulations in force in this area'.[62] The independence of the Constitutional Council has been further enhanced by the fact that the authority of its decisions has become 'clearly and explicitly expressed', so that, pursuant to Article 81 of the Constitution, they have taken on the character of being 'definitive and final'.

However, this new institution did not live up to the expectations set for it at the time of its establishment, as the process of 'constitutional oversight' during this phase was characterised by a 'slow and cautious' and "conservative" approach,[63] with the Constitutional Council hiding behind the idea of 'lack of jurisdiction' in a large number of its decisions,[64] which not only reflects the weakness of the Constitutional Council's status and the legal mechanisms available to it, but also restricts its oversight function, which is supposed to complement the legal rules set out in the constitutional document. Here, we primarily refer to the role and function of the constitutional judge in legal jurisprudence and creativity. On another level, referring to statistics up to 2010, i.e., approximately 16 years of the Constitutional Council's existence as an independent institution, we find that "of the 780 decisions taken by the Constitutional Council, 622 relate to electoral disputes, 2 referendums, 22 regulatory laws, 12 internal laws, and 10 ordinary laws".[65] If constitutional oversight of "ordinary laws" is "the cornerstone of any constitutional judiciary",[66] then the fact that only 10 of the 780 decisions relate to ordinary laws gives an idea of the 'weakness of constitutional review of ordinary laws' and is therefore a clear indication of the weakness and limitations of the Constitutional Council's working mechanisms and mechanisms.[67] In terms of the nature of the decisions taken by the Constitutional Council, we note a complete absence of issues relating to the protection of fundamental individual rights and freedoms, as well as of questions relating to constitutional law that allow for the understanding, explanation, and completion of the constitution's meaning. About the right of individuals to appeal, we note that all Moroccan constitutions from 1962 to 1996 agreed that individuals cannot litigate before the Constitutional Chamber or the Constitutional Council, nor before the courts, and that no judicial body was authorised to rule on the constitutionality of a law when considering a dispute brought before it. Thus, it was not possible to apply the principle of ex post facto judicial review of the constitutionality of laws.

61 Article 38 of Moroccan organic law No. 24-93 on the Constitutional Council, promulgated on 20 February 1994, as amended and supplemented, and Article 80 of Morocco 1996 Constitution.

62 Article 40 of Moroccan organic law No. 24-93 on the Constitutional Council, above mentioned.

63 Alamri, M. (2025). Constitutional Courts and the Protection of Constitutional Rights: A Comparative Analysis of Institutional Authority in Indonesia and Morocco. International Journal of Constitutional and Administrative Law, Vol. 1 No. 2, p. 118.

64 For example:
Decision No. 406-2000 of the Moroccan Constitutional Council, issued on 18 July 2000;
Decision No. 535-2003 of the Moroccan Constitutional Council, issued on 9 September 2003;
Decision No. 628-2006 of the Moroccan Constitutional Council, issued on 30 August 2006;
Decision No. 629-2007 of the Moroccan Constitutional Council, issued on 10 January 2007;
Decision No. 826-12 of the Moroccan Constitutional Council, issued on 17 January 2012.

65 Bernoussi, N. (2017), op. cit., p. 211.

66 Agüero-San-Juan, S., Paredes-Paredes, F. (2025). The Relevance of Facts in Assessing the Constitutionality of Legislation. An Analysis Based on Abstract Review Mechanisms. Ius et Praxis, Vol. 31, no. 1, p. 4. <https://doi.org/10.4067/s0718-00122025000100003>.

67 Francesco, A. (2015). The Moroccan Constitutional Transition: The Method of Contextualization and Mutual Interaction. Religion & Human Rights 10, no. 1, p. 78. <https://doi.org/10.1163/18710328-12341282>.

3.1.2 After the Arab Spring revolution of 2011: Institutional strengthening in facing structural challenges

Under the new Constitution of 2011, Chapter 129 explicitly establishes a Constitutional Court to replace the Constitutional Council, with a new composition and additional powers to ensure the independence of constitutional justice. This court is composed of 12 members who are subject to integrity requirements.[68] Six of them are appointed by the King, and the remaining six are elected by the House of Representatives and the House of Councillors for a non-renewable term of nine years. The president of the court is appointed by the King, which enshrines the dominance of the executive branch in Morocco, as is the case in Algeria.

In terms of jurisdiction, this court exercises the same powers as the former Constitutional Council, including the verification of the validity of the election of members of parliament, referendums, and the prior review of laws, among other things. However, what is new for this court is that it has been granted the right to review laws a posteriori by challenging their constitutionality.[69]

Nevertheless, despite the reforms brought about by the 2011 Constitution and the establishment of the Constitutional Court, the constitutional justice system in Morocco faces many challenges regarding the effectiveness of constitutional safeguards and individuals' access to them. Among the most prominent of these criticisms are those made by international and local organisations regarding the draft law on challenging the constitutionality of laws in Morocco, which was considered a missed opportunity to facilitate individuals' access to the Constitutional Court, as the mechanism for challenging constitutionality remains linked to raising it within the context of an existing legal dispute, This means that it is not directly open to individuals, unlike some comparative experiences that grant direct access, which raises questions about the court's ability to protect constitutional rights and freedoms effectively.

Thus, the Moroccan experience reflects an important institutional transition, but one that has not yet reached the level of complete structural transformation.

3.2 Tunisia

Constitutional institutions in Tunisia have undergone remarkable developments, leading to changes in the institutional system to keep pace with the wave of democratic transition the country experienced after the Jasmine Revolution in 2011. This has led to a series of changes in relation to the protection of constitutional justice, which can be summarised as follows:

3.2.1 Before the Arab Spring revolution of 2011: Formal oversight under the presidential system

Scholars can summarise the Tunisian experience in the field of constitutional justice in three words: silence, rejection, and failure. The founding legislator remained silent on the subject of constitutional oversight, even though the idea was not new,[70] as the 1861 Constitution established the so-called Grand Council, which was responsible for overseeing laws under Article 60. As for rejection, it is exemplified by the failure to accept an initiative submitted by a group of deputies to the Chamber of Deputies on 3 February 1971 to establish a constitutional council. The failure lies in the fact that, after the Constitutional Council was established,[71] it remained merely an advisory body to the President of the Republic and did not attain the level required of it. The pre-2011 constitution in Tunisia included an institution called 'Constitutional Council', which was established in 1990 as a symbolic step among the reforms introduced

68 Article 8 of the Moroccan organic law No. 24-93 on the Constitutional Council, above mentioned.

69 Article 133 of the Morocco 2011 Constitution.

70 Lamont, C. K., Pannwitz, H. (2016). Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia, Global Policy, Vol. 7, Issue 2, p. 279. <https://doi.org/10.1111/1758-5899.12291>.

71 Chapter 72 of the Tunisian 1959 Constitution.

by the one-party system led by the late Zine El Abidine Ben Ali, who had recently come to power. This council was responsible for reviewing the constitutionality of draft laws submitted to it. Still, it was closely linked to the powers of the president, who was the centre of the political system at that time. In addition to reviewing draft laws, the President of the Republic may refer any matters he deems relevant to the organisation and functioning of institutions to the Constitutional Council. Among the powers vested in the Constitutional Council is the authority to rule on appeals relating to the election of members of the Chamber of Deputies and the Chamber of Councillors. It also monitors the validity of referendums and announces their results. However, there were no references to powers related to electoral disputes arising from presidential elections.

3.2.2 After the Arab Spring revolution of 2011: Constitutional ambition collides with political reality

This is referred to as the post-revolution phase, during which a constitutional court[72] was established under the 2014 constitution. As the guarantor of the constitution's application, Tunisian President Kais Saied believed that the constitution required the court to be established within a year of the 2014 legislative elections. This placed the governing institutions in an impossible situation. However, in addition to this interpretation, President Saied did not hide his reservations about the parliament's move and its haste in establishing the Constitutional Court at that particular time after years of stagnation, which he described as an 'innocent move'. After he dissolved parliament in July 2021, repealed the 2014 constitution, and established a new constitution with a strengthened presidential system in 2022, the establishment of the Constitutional Court was once again delayed until 2025.[73]

Under the 2022 Constitution, the Constitutional Court consists of nine members appointed by order of the President of the Republic,[74] which enshrines the complete dominance of the executive branch over this court, unlike in Morocco and Algeria, where this control is partial. In addition, these members belong to either ordinary or administrative courts, which makes this court different from those in Algeria and Morocco, where members of the Constitutional Court are required to be both legal academics and practising judges in the field of public and constitutional law, specifically, so that the composition is comprehensive in terms of experience and expertise.[75]

In terms of its powers, it has the power to review draft laws and the constitutionality of treaties, which it can only exercise upon referral

72 A temporary body was established to oversee the constitutionality of draft laws until the establishment of the Constitutional Court, in accordance with paragraph 07 of Chapter 148 of the Tunisian 2014 Constitution and Tunisian organic law No. 14 of 2014 dated 18 April 2014 on the Provisional Authority for the Review of the Constitutionality of Draft Laws.

73 Bassam Hamdi, a political analyst working for media and international institutions in Tunisia, confirmed that "those who came to power did not want to establish the court, given its pivotal role, particularly in relation to monitoring legislation and the powers of the President of the Republic and the Speaker of Parliament. There was a desire to control the government without a court to act as a judge in cases of abuse of power or violation of the Constitution. Therefore, there is no doubt that the presidents of the republic in Tunisia and the political class missed an opportunity at the beginning of the democratic transition to complete the new institutions by establishing the Constitutional Court, which could have spared the political system the upheavals and risk of collapse in 2021". See: Al-Qizani, T., Suspended since 2014: Why do Tunisia's rulers fear the Constitutional Court? <https://www.dw.com/ar/%D9%85%D8%B9%D8%B7%D9%84%D8%A9 – %D9%85%D9%86%D8%B0-2014-%D9%84%D9%85%D8%A7%D8%B0%D8%A7-%D9%8A%D8%AE%D8%B4%D9%89-%D8%AD%D9%83%D8%A7%D9%85-%D8%AA%D9%88%D9%86%D8%B3-%D8%A7%D9%84%D9%85%D8%AD%D9%83%D9%85%D8%A9 – %D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1%D9%8A%D8%A9/a-72487910> Last accsess: 01.02.2026.

74 Article 125 of the Tunisian 2022 Constitution.

75 Vanberg, G. (2015). Constitutional Courts in Comparative Perspective: A Theoretical Assessment. Annual Review of Political Science Volume 18, 2015, p. 168. <https://doi.org/10.1146/annurev-polisci-040113-161150>.

by the President of the Republic, thirty members of the People's Assembly, or half of the members of the Council of Regions and Provinces. This is criticised because it leaves this review subject to the will of the aforementioned bodies. Furthermore, gathering thirty deputies, or half of the members of the Council of Regions and Provinces, within seven days and preparing a petition challenging the constitutionality of a bill is virtually impossible, thereby preventing the legislative authorities from exercising their right to challenge the constitutionality of a bill.[76] As for ex post facto oversight, it is the most important gain for constitutional justice in Tunisia under the 2014 Constitution, which was confirmed by the 2022 Constitution, and remains linked, as in Algeria and Morocco, to the existence of a dispute before the courts.

Thus, the Tunisian experience appears to be an example of the gap between constitutional ambition and institutional implementation.

CONCLUSION

The analysis of Algeria's institutional framework for constitutional justice, as established by the 2020 Constitution, and in light of the comparative study of Tunisia and Morocco, reveals a clear political will to strengthen the rule of law through the transition from a Constitutional Council to a Constitutional Court with expanded powers. However, this development also highlights a problematic duality: on the one hand, a clear ambition to consolidate the independence and effectiveness of constitutional justice; on the other hand, the maintenance of a strong predominance of executive power, combined with numerous imbalances and drafting shortcomings, as well as the hybrid nature of certain texts governing the functioning of the Constitutional Court.

Undeniably, this Constitution represents a significant normative advance, insofar as it replaces a predominantly political institution with a judicial court. In theory, the Court now has broader powers than those provided for in the previous Constitution, while the strengthening of legal specialisation . notably through the integration of academics specialising in constitutional law . contributes to increasing its professionalism and scientific credibility.

However, given its relatively recent establishment, the Court faces several obstacles and challenges, including an implicit dependence attributable to the strengthening of the executive branch's influence, particularly with regard to the appointment of its members. Furthermore, the executive's control over the mechanisms for determining the incapacity of the President of the Republic and the vacancy of the presidency increases the risk of institutional paralysis in times of political crisis. In addition, the scope of presidential powers in matters of referral limits, in practice, reduces democratic access to constitutional justice and reduces the effectiveness of oversight.

Formally, the wording of the Constitution remains somewhat vague, similar to that observed in previous texts, and requires greater clarity and rigour in order to avoid any legal ambiguity. Consequently. As in Algeria, analysis of the Moroccan and Tunisian experiences shows that the transition from a constitutional council to a constitutional court represents a crucial institutional step in the process of enshrining the supremacy of the constitution. However, the effectiveness of this transition remains contingent on the availability of genuine guarantees of independence and effective access for individuals. The establishment of a constitutional court does not necessarily mean the establishment of a comprehensive constitutional justice system, as the reform may turn into mere organisational reengineering if political domination continues or appeal mechanisms become complicated. And in light of the above, the following recommendations can be made:

- Transition from 'institutional' constitu-

76 Tamburini, F. (2021). The Ghost of the Constitutional Review in Tunisia: Authoritarianism, Transition to Democracy and Rule of Law. Journal of Asian and African Studies, Vol. 57, Issue 4. <https://doi.org/10.1177/00219096211037039>.

tional justice to 'societal' constitutional justice, where experience in the countries under comparison reveals the continuing institutional nature of constitutional justice, where access to it remains governed by the will of political actors or the existence of a legal dispute. However, recent trends in constitutional justice have brought it closer to society by expanding the right to appeal, particularly through direct individual appeal mechanisms or by easing the conditions for challenging constitutionality. The broader the scope of access, the stronger the court's rights function becomes, transforming it from a guardian of the constitutional order into an effective guarantor of rights;

- Reconsidering the composition of the Constitutional Court in the countries under comparison by eliminating the subordination of the President of the Court to the executive authority by electing members of the Constitutional Court, instead of appointing them by the President of the Republic;
- Improving the quality of Algerian constitutional drafting by emphasising clarity, precision of terminology, and internal consistency to prevent any ambiguity of interpretation;
- Eliminate the overlap between the internal rules of procedure and the rules governing the functioning of the Court by unifying the two normative systems within a single, coherent, and clearly hierarchical legal framework;
- Amending the last paragraph of Article 198 of the Algerian constitution to specify that the decisions, opinions, and statements of the Constitutional Court are final and binding on all authorities. Ideally, all statements by the Constitutional Court should be standardised in the form of decisions;
- Establishing a notification mechanism for the occurrence of an impediment or vacancy in the office of the Algerian President of the Republic to prevent any political crisis;
- Moving beyond the traditional concept of independence based solely on constitutional provisions, towards adopting the concept of composite independence, which combines independence of appointment, functional independence, and financial independence. Comparative experience shows that the most serious manifestations of political influence do not occur through texts but through appointment mechanisms. Therefore, it is advisable to adopt a pluralistic appointment model that distributes the power to select among several constitutional institutions, thereby preventing a single political actor from monopolizing the power to form the court.

Finally, the real challenge facing contemporary constitutional systems is no longer choosing an oversight institutional model, but rather ensuring its effectiveness. The difference between a constitutional council and a constitutional court may be more a matter of nomenclature than substance if the institution lacks guarantees of independence and openness. Accordingly, the future of constitutional justice in comparative experiences seems to depend on the transition from constitutionalising the institution to constitutionalising the practice, i.e., from establishing bodies to enabling them to perform their role as a countervailing power that guarantees the supremacy of the constitution and limits the encroachment of power.

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Precarious Legal Status and the Protection of Migrant Workers' Rights: An International Compliance Analysis of Algerian Law

Bentaallah Zahira

Ph.D in Law, Lecturer B, University of Ain Temouchent, Algeria, Laboratory of Fundamental Private Law

zahira.bentaallah@univ-temouchent.edu.dz

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ABSTRACT

Labour migration is considered one of the most significant forms of human mobility today, as individuals seek to improve their living conditions by pursuing employment opportunities beyond their countries of origin. The impact of migrant workers extends beyond their personal and familial economic stability, contributing to two broader developmental goals: fostering socio-economic progress and reducing poverty in their home countries through remittances, and supporting labour market demands and economic activity in host states. Despite these vital contributions, migrant workers remain among the groups most exposed to vulnerability, owing to precarious working conditions, restrictive migration policies, and the limited effectiveness of existing legal protection mechanisms.

Against this background, this research examines the principal challenges that hinder the strengthening of legal protection for migrant workers. It further assesses the extent to which current national and international frameworks align

with the relevant international instruments, while exploring possible approaches to enhancing these protective measures to ensure the full respect of migrant workers' rights and fundamental freedoms.

INTRODUCTION

The individual's right to freedom of movement, including the right to leave one's country for any other State, is enshrined in numerous international instruments. These guarantees were first recognized in Article 13(2)[1] of the 1948 Universal Declaration of Human Rights,[2] followed by Article 12[3] of the 1966 International Covenant on Civil and Political Rights,[4] as well as in various instruments issued by the International Labour Organization (ILO), which aim to safeguard the rights and interests of workers, including migrant workers who cross national borders in search of employment opportunities that ensure a dignified life for themselves and their families.[5]

Given that migrant workers constitute a vulnerable category requiring protection–not only in terms of guaranteeing their right to work, but also in safeguarding their fundamental human rights due to the serious violations they often face – the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[6] was adopted. This Convention represents the first United Nations instrument specifically aimed at enhancing the protection of migrant workers' rights.

Migrant labor constitutes approximately 10% of the workforce in Western Europe and 15% in North America, while these percentages are even higher in certain African countries and the Middle East, where foreign workers make up a significant portion of the labor force.[7] According to ILO statistics, the Arab region, including the Middle East and the Gulf Cooperation Council, hosted approximately 24.1 million migrant workers in 2019, representing 49% of the workforce in the region, compared to 4.9% globally. Furthermore, the total number of migrant workers increased to 169 million in 2021, more than triple the 53 million recorded in 2010, representing 5% of the global labor force compared to less than 2% in 2010.[8]

The need to enhance the protection of migrant workers and supervision of the implementation of adopted measures is pressing, beyond ensuring adequate working conditions and social security coverage.[9] While the rights

1 It states: "Everyone has the right to leave any country, including his own, and to return to his country".

2 UN General Assembly, Universal Declaration of Human Rights (A/RES/217A(III), 10 December 1948). <https://www.un.org/ar/about-us/universal-declaration-of-human-rights>.

3 It provides: "Everyone has the freedom to leave any country, including his own".

4 UN General Assembly, International Covenant on Civil and Political Rights (A/RES/2200A(XXI), 16 December 1966) entered into force 23 March 1976. <https://www.ohchr.org/ar/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

5 Ali Al-Din Ahmed, R. (2018). The legal status of the migrant worker: A study in light of the rules of international treaty law and national legislation. Journal of Legal and Economic Research, 65, p. 21.

6 UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (A/RES/45/158, 18 December 1990) entered into force 1 July 2003. <https://www.ohchr.org/ar/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers>.

7 Muslim, S., Hadiwinata, K., Khoirunnisa, R., Hadiyantina, S., Ayub, Z. A. (2024). ILO conventions and migrant workers: Construction of protection in national labor law. NURANI: Jurnal Kajian Syari'ah dan Masyarakat, 24(2), p. 303. <https://doi.org/10.19109/nurani.v24i2.22152>.

8 International Labour Organization. (2021). ILO global estimates on international migrant workers: Results and methodology (3rd ed.). <https://www.ilo.org>.

9 Servais, J.-M. (2019). *International migration and*

of migrant workers are widely addressed in international law, there is a paucity of research examining how precarious or irregular legal status constrains the effective realization of these rights within national legal frameworks, particularly in North African countries such as Algeria. Compared to national workers, migrant workers face numerous challenges arising from the legal frameworks of host States, which create additional barriers to accessing their internationally guaranteed rights.

Accordingly, this study seeks to fill this gap by analyzing the relationship between the legal status of migrant workers and the protection of their rights in Algeria, identifying the legislative and institutional factors that limit the practical enforcement of rights for both documented and undocumented workers. This research aims to contribute to scholarly understanding of how precarious legal status impacts the enjoyment of labor rights, and to provide practical recommendations for strengthening legal protections for all migrant workers.

In this context, the study addresses the following central research question: To what extent does the precarious legal status of migrant workers affect their ability to enjoy legal protection within the Algerian legal system?

To address this central question and its related inquiries, this research paper is structured into two main sections: 1. **Migrant workers and the foundations of international protection**; 2. **Protection of migrant workers in national legislations and the challenges they face.**

METHODOLOGY

The study is based on a doctrinal legal analysis, examining key international legal instruments concerning the rights of migrant workers, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ILO Convention No. 97 of 1949, and ILO Convention No. 143 of 1975, in addition to Algerian national legislation on foreign labor and relevant interpretative documents.

The research combines descriptive and analytical methods, relying on primary sources such as international and national legal texts, alongside academic studies and official reports. This approach aims to identify legislative gaps, elucidate the legal challenges faced by migrant workers, and formulate practical recommendations to strengthen the protection of their rights.

Algeria has been selected as the case study country due to its relevance as both a typical and a critical example among migrant-receiving states. On the one hand, Algeria represents a typical case insofar as it hosts a significant population of migrant workers while operating within a legal framework characterized by restrictive migration policies and fragmented regulation of foreign labor–features commonly observed in several migrant-receiving countries. On the other hand, it constitutes a critical case because it reveals systemic challenges in reconciling formal international legal commitments with effective domestic implementation. The persistence of a precarious legal status for migrant workers, coupled with limited enforcement mechanisms, highlights structural gaps between international standards and national practice. Analyzing the Algerian legal framework therefore allows for a meaningful assessment of compliance with international obligations and provides insights into broader structural issues affecting migrant workers' rights in comparable legal systems.

The study does not employ quantitative or statistical methods; instead, it focuses on legal text analysis, comparative legislative review, and the exploration of the legal and rights-based dimensions of migrant worker protection, while providing actionable recommendations to enhance the effective implementation of international standards at the national level.

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Migrant Workers and the Foundations of International Protection

Before examining the foundations of international law in shaping the legal protection afforded to migrant workers, it is essential first to clarify the concept of a migrant worker. Who qualifies as a migrant worker? Does this term encompass both regular and irregular workers?

The Conceptual Definition of Migrant Workers

The definition of a migrant worker is provided in Article 2(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which states:

"A migrant worker is a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national".

To avoid potential overlaps or ambiguities, Article 3 of the same Convention provides a list of categories of persons to whom the definition of a migrant worker does not apply. These include: officials of international organizations; government officials; persons sent or employed by a State, or on its behalf, outside its territory; persons participating in development programmes or other forms of cooperation; investors; refugees and stateless persons; students and trainees; and seafarers and workers on offshore installations who have not been authorized to reside and engage in remunerated activities in the State of employment.

Furthermore, the Convention provides a specific definition of the concept of family members of migrant workers, particularly since it is formally entitled "The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" Article 4 states:

"...the term 'members of the family' refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage; as well as their dependent children and other dependent persons who are recognized as members of the family in accordance with applicable legislation or relevant bilateral or multilateral agreements between the concerned States".

Notably, this article relies heavily on national legislation, granting State Parties flexibility in determining who qualifies as a family member under their domestic legal systems. However, this approach may result in significant disparities in protection between States, potentially creating situations of discrimination or depriving certain categories of individuals of the rights guaranteed under the Convention.

The Foundations of International Protection for the Rights of Migrant Workers

The discussion of the right to work necessarily leads to the International Labour Organization (ILO), established in 1919, which is exclusively mandated to protect the rights of all individuals who possess the status of "worker", regardless of their legal position, including migrant workers, whether in a regular or irregular situation. The ILO has adopted several instruments dedicated to this category, notably:

Convention No. 97 of 1949 on Migrant Workers[10]

This was the first ILO Convention to focus exclusively on migrant workers.[11] It entered into

10 International Labour Organization (ILO). *Migration for Employment Convention (Revised (No. 97,* 1 July 1949)), entered into force 22 January 1952. <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40normes/documents/normativeinstrument/wcms_c097_ar.pdf>.

11 Al-Kalash, L. M. H. (2018). International and national freedoms and fundamental rights of migrant workers. Master's thesis, College of Law, Middle East Universi-

force on 22 January 1952 and comprises 32 articles and three annexes. The Convention emphasizes the necessity of respecting the principle of equality of treatment between migrant workers lawfully present in the host State and the nationals of that State regarding their rights and guarantees. It further requires that migrant workers be allowed to transfer their earnings and savings and mandates the establishment of medical units responsible for verifying the health conditions of migrant workers both upon departure and upon arrival.

Although Convention No. 97 suffers from a low ratification rate, it has nevertheless played a fundamental role in shaping the legal discourse on migration and continues to influence bilateral labour agreements. This Convention served as a precursor to later instruments, such as Convention No. 143 and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). Its legal provisions continue to function as a normative reference in ILO jurisprudence and in contemporary migration policies.

Convention No. 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers[12]

Adopted on 24 June 1975 and entering into force on 3 December of the same year, this Convention comprises 24 articles. Through this instrument, the ILO underscored the necessity of respecting the human rights of all migrant workers, eliminating clandestine migration for employment, and combating the irregular employment of migrants. It also introduced an important provision–absent from earlier instruments–in Article 8, which stipulates that the loss of employment by a migrant worker lawfully residing in the State shall not affect his legal status, nor shall it, under any circumstances, lead to the withdrawal of his residence permit.

The Convention reinforces the principle of equality of opportunity and treatment regarding the working conditions of migrant workers lawfully present in a State's territory.[13] It calls upon States to adopt all necessary measures to prevent the unlawful employment of migrant workers and to facilitate the reunification of their families, including spouses, children, and parents. Furthermore, the Convention ensures that migrant workers – including those in an irregular situation – have the right to present their claims before a competent authority in disputes concerning their rights. This provision is vital to guarantee that all workers, regardless of their legal status, can access legal remedies and are protected against exploitative practices by employers.

It is evident from this Convention that it establishes a precise distinction between the rights granted to irregular migrant workers and the broader labour and social entitlements guaranteed to those in a regular situation, aiming to balance humanitarian protection with the sovereign prerogatives of States in regulating migration. While the Convention's legal character is widely recognized, its practical impact has been affected by the limited scope of ratification.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)

Following the United Nations' affirmation that the promotion and protection of the rights of migrant workers are fully aligned with human rights principles, the International Convention

ty, Jordan, p. 57.

12 International Labour Organization. Migrant Workers (Supplementary Provisions) Convention (No. 143, 24 June 1975) entered into force 9 December 1978. <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_norm/%40normes/documents/normativeinstrument/wcms_c143_ar.pdf>.

13 Al-Kalash, Op.cit, p. 61.

on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) was adopted in 1990, becoming the first comprehensive international instrument dedicated to safeguarding the rights of migrant workers. It is classified among the "core international human rights instruments" as defined by the Office of the United Nations High Commissioner for Human Rights.[14]

As of November 2025, 60 States had ratified the Convention, most of which are migrant-sending countries. Zimbabwe became the most recent State Party in 2024. This remains a relatively limited number when measured against the Convention's importance and global relevance.

The Convention seeks to establish minimum standards that States Parties must apply to migrant workers and their families falling under their jurisdiction. It calls for measures to prevent clandestine movements and trafficking of migrant workers, while ensuring their protection under fundamental human rights standards.

The Convention comprises 93 articles organized into nine parts, which define the categories of individuals covered, including both regular and irregular migrant workers. It affirms the principle of equal treatment among all workers – nationals, regular migrants, and irregular migrants – while providing broader rights and enhanced protections to regular migrant workers.

It enumerates a wide range of rights, encompassing general human rights as well as labour-specific rights, such as the right to life, liberty, freedom from torture or inhuman treatment, and freedom of opinion and expression, among others.[15]

With respect to economic, social, and cultural rights, the Convention draws extensively from the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 32 grants migrant workers and their families the right to transfer their earnings, savings, personal belongings, and household effects upon the end of their stay. In the event of death, States Parties must facilitate, where necessary, the repatriation of the remains of deceased migrant workers and their family members. Some scholars argue that, in certain respects, the Convention is more restrictive than the aforementioned Covenant.[16]

A significant development introduced by the Convention is its recognition, for the first time, of the right of migrant workers to join trade unions under Article 40, thereby affirming their right to trade-union representation aimed at protecting and promoting their economic, social, cultural, and other interests. The Convention also prohibits any person–other than an authorized public official–[17] from confiscating a migrant worker's identity documents under any circumstances.

Furthermore, the Convention guarantees the right of undocumented or irregular migrant workers to receive urgent medical care. Under Article 29, children of migrant workers have the right to a name, birth registration, and nationality. They are also entitled to access education on an equal basis with nationals, and their admission to preschool or public educational institutions may not be denied due to the irregular status of either parent.

Protection of Migrant Workers in National Legislation and the Challenges Faced

The implementation of any international convention requires ensuring harmony between its provisions and the domestic legislation of

14 Muslim, S., Hadiwinata, K., Khoirunnisa, R., Hadiyantina, S., Ayub, Z. A., Op. cit, p. 303.

15 Ben Taher, A. (2020). International protection of migrant workers' rights within the framework of the International Labour Organization and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Journal of Humanities, University of Oum El Bouaghi, 7(2), p. 110.

16 Nafziger, J. A. R., & Bartel, B. C. (1991). The migrant workers convention: Its place in human rights law. International Migration Review, 25, p. 781. <https://doi.org/10.1177/019791839102500406>.

17 Ben Taher, Op.cit, p. 111.

the States that have ratified it. Accordingly, aligning national legislation with the ratified international instruments becomes a necessary legal obligation. In this regard, it is noteworthy that Algeria has taken care to accede to several international conventions concerning migrant workers, beginning with ILO Convention No. 97 of 1949 on Migrant Workers, ratified on 19 October 1962, as well as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which Algeria ratified pursuant to Presidential Decree No. 04-441 of 29 December 2004.

The Legal Framework Governing the Employment Conditions of Foreign Nationals in Algeria

The Algerian Labour Law No. 90-11 of 21 April 1991, as amended and supplemented, does not contain provisions specifying the conditions for employing foreign labour in Algeria. It merely stipulates, under Article 21, that employers may resort to hiring foreign workers whenever qualified national labour is unavailable, thereby referring the regulation of foreign workers' employment to other regulatory texts–most notably Law No. 81-10[18] concerning the conditions of employment of foreign workers. This law sets out several substantive and procedural requirements governing the employment of foreign nationals, emphasizing that any foreigner intending to engage in remunerated activity in Algeria must hold either a work permit or a temporary work authorization issued by the competent authorities.[19]

While these provisions provide a formal regulatory framework, a compliance assessment against international standards reveals significant gaps. According to ILO Conventions No. 97 and No. 143, as well as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, states are required to ensure that migrant workers–regardless of documentation–enjoy equal protection and access to employment rights. However, as Freedland and Costello note, migration law plays a decisive role in creating status-based distinctions in the application of labour law, determining whether individuals are allowed to work "legally" or are classified as "illegal" or "undocumented" workers, a division that constitutes "one of the most basic distinctions in personal work status" and directly affects the scope of labour protection available to them.[20]

In comparison, Algeria's framework primarily addresses documented workers and imposes restrictions, such as fixed-term contracts, which do not fully align with the principle of non-discrimination and equal treatment under international law. Furthermore, the legal requirement that foreign workers' residence and employment status be contingent upon specific authorizations reinforces a condition of dependency and precarity, which, according to comparative labour law scholarship, exposes migrant workers to heightened vulnerability and limits their effective access to labour rights. Comparative examples from countries with stronger migrant protection regimes show that mechanisms such as automatic contract renewal, legal safeguards for irregular workers, and accessible complaint procedures are essential for ensuring effective

18 People's Democratic Republic of Algeria. Law No. 81-10 (July 11, 1981), on the conditions of employment of foreign workers. Official Gazette 28 (July 24, 1981).

19 The authorization for employing foreign workers takes several forms:
Preliminary approval: This is a permit issued by the Ministry of Labour after consulting the consular authorities of the respective country, following the submission of a request for a foreign worker to enter for employment purposes;
Temporary work authorization: Issued by the competent authorities under the Ministry of Labour to prepare the foreign workers' entry file while awaiting the issuance of a temporary work permit and passport;
Temporary work permit: Allows the foreign worker to carry out work not exceeding a period of three (3) months;
Work passport: Issued to personnel who are qualified to begin work after obtaining preliminary approval from the Ministry and a special authorization.

20 Costello, C., Freedland, M. (2014). Migrants at work: Immigration and vulnerability in labour law. Oxford University Press, pp. 10-13.

compliance with international standards.

Moreover, pursuant to Article 10 of Law No. 81-10, and in contrast to employment contracts concluded with national workers–which are presumed to be of indefinite duration unless otherwise provided by law–contracts concluded with foreign workers must necessarily be fixed-term, with a maximum duration of two years, renewable only upon issuance of a work permit. In cases where a temporary work authorization is granted, the employment contract must be limited to a period of three months or less, and such authorization may not be renewed more than once per year. Under no circumstances may the renewal of either a work permit or a temporary work authorization result in reclassifying a fixed-term contract into an indefinite-term contract.

From an international compliance perspective, these limitations demonstrate a partial alignment with core conventions. While Algeria provides fundamental rights such as remuneration and social security coverage, the restrictions on contract duration and renewal, and the exclusion of undocumented workers from many protections, highlight non-compliance with the minimum standards of ILO and UN conventions. This gap is not unique to Algeria, but comparative analysis shows that countries with stronger enforcement mechanisms ensure that all migrant workers, including those in irregular status, can exercise their labor rights effectively, thus fully meeting international obligations.

The law guarantees foreign workers most of the rights enjoyed by any worker in Algeria, including the right to receive remuneration[21] and to benefit from social security coverage against various risks. Article 28 of Law No. 08-11[22] concerning the conditions of entry, residence, and movement of foreigners in Algeria requires that the employment of a foreign national be declared within 48 hours to the territorially competent services of the ministry in charge of employment. In the absence of such services, the declaration must be submitted to the territorially competent police department or gendarmerie unit.

From the foregoing, it is evident that the protection of migrant workers' rights under Algerian legislation remains limited and fragmented and is largely oriented toward documented workers. National legal provisions have not yet fully incorporated the core international conventions governing migrant workers' rights, thereby revealing a clear gap between Algeria's international obligations and its domestic legal framework. In this context, the fragmentation of international labour standards, together with their inadequate transposition and practical implementation at the national level, constitutes one of the principal challenges to the effective protection of migrant workers' labour rights.[23]

Consequently, it can be concluded that the legal protection currently afforded to migrant workers in Algeria is partial and largely confined to regular workers. This situation underscores the pressing necessity for a comprehensive reform of national legislation and the establishment of robust protective mechanisms capable of ensuring full compliance with international human rights and labour standards, thereby guaranteeing equal legal protection for all migrant workers irrespective of their legal status.

Challenges to the Protection of Migrant Workers' Rights

Migration has a significant impact on the global economy. Accordingly, it is essential to

21 According to Article 16 of Law No. 81-10 mentioned above: "A foreign worker subject to this law shall receive the same salary corresponding to the reference number of the position that his Algerian counterpart of the same level could occupy, and, where applicable, an increase in remuneration within the Algerian territory when required".

22 People's Democratic Republic of Algeria. Law No. 08-11 (June 25, 2008), concerning the conditions of entry, residence, and movement of foreigners in Algeria. Official Gazette 36 (July 2, 2008).

23 Artemov, V., Simonenko, O., Zhalubak, V., Mykhailyk, O., Borsuk, N. (2025). Legal Mechanisms for Protecting Migrants' Labour Rights in Host Countries. Revista Jurídica Portucalense, 1(38), p. 391. <https://doi.org/10.34625/issn.2183-2705(38)2025.ic-20>.

recognize that the contributions of migrants to the economies and societies of host countries, as well as to the development of their countries of origin, depend on legal protection and the acknowledgment of their human rights by these states.[24]

Although there is a continuous emphasis on the necessity of ensuring protection for all migrant workers, regardless of their legal status in the host country, the reality demonstrates the exact opposite. Migrant workers continue to face various forms of abuse and exploitation,[25] particularly those engaged in temporary or seasonal work, those in an irregular situation, or those lacking the required documentation. They are frequently subjected to deceptive recruitment practices, the absence of written employment contracts, non-payment or underpayment of wages, and the confiscation of identity documents–as observed in certain sponsorship systems–despite the explicit legal prohibition of such practices. They may additionally suffer from limited awareness of their rights and applicable laws, fear of identity disclosure leading to arrest and deportation, and restricted access to social services. According to Gleeson,[26] fear of detection and deportation significantly discourages undocumented workers from asserting their labour rights, rendering legal protections largely ineffective in practice.

In this context, the case of *Chowdury and Others v. Greece* (30 March 2017) constitutes a significant judicial precedent in the field of migrant workers' rights protection. The case involved 42 Bangladeshi workers recruited to work in strawberry harvesting at a farm in the Manolada region of Greece without obtaining work permits. Their employers failed to pay their wages and compelled them to work under harsh physical conditions under the supervision of armed guards. Several workers were shot by the guards while claiming their rights, resulting in dozens of injuries. The European Court of Human Rights (ECHR) held that the situation amounted to human trafficking and forced labor, and that the Greek State had failed to prevent trafficking, protect the victims, conduct an effective investigation, and punish those responsible. This judgment represents a landmark precedent, as it was the first time that an international court condemned a Member State for the exploitation of irregular migrant workers, establishing the principle that the right to protection cannot be nullified by the irregular legal status of the worker.[27]

Similarly, the case of *Zoletic and Others v. Azerbaijan* (07 October 2021) illustrates another dimension of the exploitation faced by migrant workers. The claimants filed complaints regarding inhumane living and working conditions, non-payment of wages, occupational discrimination, restrictions on freedom of movement, and health hazards in the workplace. The ECHR ruled that an employee's prior consent is insufficient if their vulnerability or legal status is exploited; in other words, the exploitation of vulnerability distinguishes lawful work from forced labor. The Court further emphasized the State's responsibility to ensure the protection of all workers, including undocumented migrants, from violations and exploitation, and to adopt preventive measures safeguarding their fundamental rights.[28]

In the Algerian context, undocumented migrant workers face similar structural challenges: the national legal framework primarily protects documented workers, while irregular workers remain exposed to exploitation and have limited access to legal remedies. An analy-

24 Muslim, S., Hadiwinata, K., Khoirunnisa, R., Hadiyantina, S., Ayub, Z. A., Op.cit, p. 305.

25 Servais, J.-M., Op.cit, pp. 60-62.

26 Gleeson, S. (2010). Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making. Law & Social Inquiry, 35(3), pp. 33–36. <https://doi:10.1111/j.1747-4469.2010.01196>.

27 European Court of Human Rights. (2017, March 30). *Chowdury and Others v. Greece*. Application No. 21884/15. Strasbourg: ECHR. <https://hudoc.echr.coe.int/eng#{%22appno%22:[%2221884/15%22]}> (Last access: November 22, 2025).

28 European Court of Human Rights. (2021, October 07). Zoletic and Others v. Azerbaijan, Application No. 20116/12. Strasbourg: ECHR. <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-212040%22]}> (Last access: November 21, 2025).

sis of these European precedents demonstrates that the legal status of migrant workers is a decisive factor in determining the scope and effectiveness of rights protection. Accordingly, these cases function not merely as illustrative examples but as analytical tools to identify legislative gaps, understand how precarious legal status undermines rights, and propose reforms that could strengthen protection for all workers, including those in irregular situations.

Consequently, these judicial precedents underscore the urgent need for Algeria to establish a comprehensive protection framework, incorporating effective enforcement mechanisms and preventive measures to ensure that all migrant workers, regardless of their legal status, can exercise their fundamental rights. The most important of these mechanisms include the following:

- Harmonizing national legislation with international conventions, as this strengthens legal protection and reduces the exploitation gaps that often arise from legislative ambiguity;
- Strengthening labour inspectorates with robust monitoring mechanisms is crucial to ensure employer compliance with legal standards and to address violations effectively. Research shows that the protection of migrant workers' rights relies not only on legislative frameworks but also on the effectiveness of enforcement. In practice, legal protection is measured not by what is written in law but by its actual implementation, which explains the wide gap between countries that rigorously apply international standards and those that merely acknowledge them;[29]
- Promoting fair and adequate working conditions, ensuring minimum wage guarantees, and facilitating access to decent and healthy living conditions for migrant workers;
- Enabling migrant workers to join trade unions without restrictions and ensuring their representation in social dialogue, which constitutes a fundamental pillar of their protection;
- Coordinating efforts among states through bilateral or multilateral agreements aims to ensure the protection of migrant workers' rights. This cooperation focuses on establishing binding mechanisms through which states commit to monitoring the conditions of migrant workers, exchanging information related to employment contracts, working conditions, and potential violations, in addition to enforcing legal rights and safeguarding workers in the event of any infringement. This international framework enables joint action to prevent exploitation and ensures the effective implementation of international legal standards;[30]
- Implementing permanent monitoring mechanisms of migrant workers' conditions and preparing regular reports to assess compliance with their rights and identify the issues and challenges they face;
- Coordinating efforts with institutional actors and non-governmental organizations to provide legal and social support for migrant workers and safeguard their fundamental rights.

CONCLUSION

Migration is a global phenomenon accompanied by numerous challenges, among which the protection of migrant workers stands out as a key concern. This study demonstrates that the precarious legal status of migrant workers in Algeria directly restricts the effective realization of their rights, affecting access to fair remuneration, social security, and legal recourse in cases of abuse or exploitation. Workers in irregular situations are particularly vulnerable, as the le-

29 Artemov, V., Simonenko, O., Zhalubak, V., Mykhailyk, O., Borsuk, N., Op. cit, p. 399.

30 Ibid., p. 401.

gal framework primarily addresses documented labour, leaving undocumented workers exposed to unsafe working conditions and limited enforcement of their fundamental rights.

The analysis of the Algerian case highlights several specific findings: first, national legislation, while formally providing for basic labour rights, remains fragmented and largely confined to regular workers, failing to fully incorporate the provisions of core international conventions, including ILO Conventions No. 97 and 143, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Second, the implementation gap and administrative limitations exacerbate workers' vulnerability, illustrating how precarious legal status functions as a structural barrier to the enjoyment of rights. Third, comparative references to international standards show that effective protection requires not only legal provisions but also coordinated enforcement mechanisms and political commitment, which remain underdeveloped in the Algerian context.

Accordingly, this research advances existing academic understanding by demonstrating that the legal status of migrant workers is not merely a formal condition but a decisive factor shaping the realization of their rights. The study's findings underscore the pressing need for a comprehensive reform of national legislation, the establishment of robust protective mechanisms, and the incorporation of international standards into domestic law. Such measures are essential to guarantee equal legal protection for all migrant workers in Algeria, irrespective of their documentation, and to enhance the country's contribution to global labour rights protection.

Based on these conclusions, several legal recommendations can be proposed:

- Encouraging states to ratify the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as it constitutes a guiding framework for states and an important legal instrument for national and international organizations concerned with protecting and promoting the rights of migrant workers;
- Conducting a comprehensive review of national legislation by expanding the scope of fundamental rights and protections to include all migrant workers, regardless of their legal status, in addition to developing effective protection mechanisms that ensure compliance with international human rights and labour standards;
- Strengthening cross-border legal cooperation through bilateral and multilateral agreements under which states commit to monitoring and safeguarding the rights of migrant workers;
- Enhancing substantive and procedural safeguards in labour laws by integrating international standards into national legislation and developing effective enforcement mechanisms to ensure the practical protection of labour rights.

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The Legal Dilemma of Chemical Castration in Algeria: Balancing Criminal Legality and Human Dignity Amidst Legislative Silence

Lassoued Moussa

Ph.D. Associate Professor "A", University of Tipaza, Algeria

Lassoued.moussa@Cu-tipaza.dz

Mouada Mohamed Amine

Ph.D. Associate Professor "A", University of Tipaza, Algeria

mouada.mohamed@cu-tipaza.dz

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ABSTRACT

This study aims to analyze chemical castration as a newly introduced mechanism within criminal policy to address sexual offenses against minors, in light of the balance between the need to deter sexual crimes and the imperative to protect human dignity, It departs from the growing gravity of sexual crimes against children and the resulting societal demand for harsher punishment, by examining the legitimacy of incorporating chemical castration into the Algerian penal system. This modern measure, which functions by suppressing sexual hormones to reduce aggressive impulses, has sparked deep doctrinal debate—between those who regard it as a preventive measure that enhances public safety, and those who view it as a violation of bodily integrity and human rights protected under international conventions. The study also

discusses the Algerian constitutional framework, which enshrines the principles of legality and protection of the human body, concluding that the adoption of chemical castration requires explicit legislative regulation defining its nature and safeguards. Ultimately, the research finds that chemical castration represents a hybrid measure, combining elements of deterrence and treatment, and recommends that the Algerian legislator conduct a careful assessment before its adoption to ensure compliance with the Constitution and international human rights obligations.

INTRODUCTION

The issues pertaining to the sexual assault and exploitation of minors are universally recognized as some of the most heinous, grievous, and alarming crimes within the fabric of modern societies. This recognition stems from the devastating, multifaceted, and long-term psychological, physiological, and sociological repercussions that such crimes inflict upon the victims, effectively shattering their fundamental well-being. The profound gravity of these offenses has exerted significant pressure on legislative and judicial authorities worldwide, compelling them to engage in an arduous search for efficacious and robust mechanisms designed for the prevention and deterrence of such catastrophic criminal activities. In recent decades, the field of criminal policy has witnessed profound paradigm shifts and deep structural transformations, necessitated by the burgeoning challenges posed by the contemporary reality of sexual criminality against children. These developments, which frequently provoke intense social shock and profound moral anxiety among the general public, have driven legislators in numerous jurisdictions to explore non-conventional, innovative legal instruments aimed at addressing the inherent dangerousness of these offenders and significantly curtailing the probability of criminal recidivism. Among the most prominent and controversial of these tools, which has ignited a fierce and polarized debate within both jurisprudential circles and human rights advocacy groups, is the measure colloquially and legally referred to as Chemical Castration.

This specific procedure, alternatively classified as a sanction or a medicalized intervention, is fundamentally predicated upon the administration of sophisticated pharmacological agents. These medical substances are designed to induce a temporary yet substantial inhibition and suppression of the sexual hormones (specifically, androgens) that are biological drivers of sexual desire and behavior. The ultimate objective of this hormonal suppression is to physiologically diminish the aggressive impulses inextricably linked to sexual assault. Indeed, this mechanism has been formally integrated and implemented within the legislative frameworks of several foreign nations, including but not limited to France, Poland, South Korea, and various states within the United States of America. In these jurisdictions, chemical castration is applied either as a voluntary measure, often serving as a stringent condition for parole or conditional release, or as a mandatory sanction, functioning as a specific statutory penalty imposed upon perpetrators of aggravated sexual assaults, particularly those targeting infants and minors.

Notwithstanding its purported efficacy, chemical castration remains the subject of a monumental and unresolved dialectic between two opposed jurisprudential schools of thought.

The first orientation, which is primarily preventive and prophylactic in nature, posits that this measure constitutes an exceptionally effective tool for neutralizing. Proponents of this view argue that it significantly bolsters communal security and serves as a vital barrier against the recurrence of the crime. Their logic is anchored in the philosophical premise that the collective right to safety and the specific protection of the child's innocence must take precedence over the individual rights of the offender who has, through their own transgressions, forfeited certain social and legal claims. Conversely, the second jurisprudential orientation contends that this procedure strikes at the very core of inherent human dignity. They argue that it involves a form of bodily intrusion and physical interference that is strictly prohibited under the mandates of international human rights law. They specifically invoke the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, asserting that such measures represent a violation of the prohibition against any treatment that is cruel or degrading, even when conducted under the auspices of criminal justice.

Within this complex conceptual landscape, this study seeks to illuminate the current state of criminal policy within the Algerian Legislative Framework. Algeria, like many other nations, has unfortunately become a theater for sexual crimes perpetrated against children, leading to a surge in societal demands for the imposition of the most draconian and rigorous penalties against such offenders. Consequently, this subject acquires a singular importance given that the national punitive system has, for several years, trended toward an intensification of sanctions for crimes affecting children. This trend is clearly manifested in the Child Protection Law and the subsequent amendments to the Penal Code, both of which introduced stringent provisions targeting sexual predators. However, the Algerian legislator has remained notably silent regarding the specific issue of chemical castration, failing to address it either explicitly or by implication. This legislative silence raises critical questions concerning the possibility of adopting such a measure, perhaps under the legal umbrella of preventive measures or within the broader framework of the reform and rehabilitation of the offender. Despite the growing international debate, Algerian legal scholarship has not yet provided a systematic analysis of chemical castration within the framework of criminal legality and human dignity.

The complexity of this issue is further exacerbated by the fact that the traditional demarcation between Punishment and Preventive Measures is becoming increasingly blurred in contemporary criminal jurisprudence. Modern criminal policy is progressively moving toward the adoption of what are known as Hybrid Measures, which simultaneously combine punitive-deterrent characteristics with therapeutic-remedial objectives. Chemical castration epitomizes this duality; it possesses a judicial character because it is typically mandated by a court order, yet it also maintains a medical-preventive character because its primary aim is the reduction of criminal risk through biological and clinical intervention.

The significance of this research is manifested in its endeavor to address the existing legislative vacuum within the Algerian penal system. It achieves this by critically evaluating the potential for incorporating chemical castration as a tool for achieving Preventive Justice, while ensuring that such an inclusion does not undermine the fundamental and non-derogable guarantees of the accused. Theoretically, this study contributes to the enrichment of Arab criminal jurisprudence by engaging in a modern discourse that keeps pace with international trends in combating sexual criminality. Practically, it aims to provide the Algerian legislator with a balanced and nuanced vision that navigates the tension between the imperatives of social security and the necessity of respecting the foundational human rights of the individual.

Consequently, and considering the aforementioned context, the Fundamental Problematic that this research seeks to address

can be formulated as follows: To what extent can chemical castration be characterized as a criminal penalty that is compatible with the principles of criminal legality and international human rights standards? Conversely, should it be regarded merely as a preventive measure cloaked in a punitive appearance, thereby conflicting with the constitutional values regarding human dignity and bodily integrity as enshrined in Algerian legislation?

To address this problem, the researcher will adopt a Descriptive-Analytical and Comparative Methodology. This approach will involve a comparative analysis of the jurisprudential and legal conceptualization of chemical castration, considering international experiences. By utilizing analytical tools, the study will discuss the legal translatability of chemical castration into the Algerian legal environment, grounded in constitutional principles and relevant international human rights conventions.

The study employs a descriptive-analytical and comparative methodology, examining selected foreign legal systems to assess the normative transposability of chemical castration into the Algerian constitutional framework. The analysis is conducted across multiple levels, including the doctrinal, constitutional, and international human rights dimensions, with reference to the legal experiences of France, Poland, and the USA.[1]

1. THE CONCEPTUAL AND THEORETICAL FRAMEWORK OF CHEMICAL CASTRATION

Chemical castration is theoretically conceptualized as a sophisticated pharmacological and therapeutic intervention. It primarily entails the systematic administration of anti-androgen medications or the utilization of gonadotropin-releasing hormone inhibitors that act upon the pituitary-gonadal axis. The fundamental objective of this clinical procedure is to substantially decrease testosterone concentrations or systematically inhibit their physiological and psychological impact on the physical and behavioral disposition of the individual subjected to the treatment. It is analytically imperative to distinguish chemical castration from Surgical Castration. While the latter is characterized by the permanent, irreversible, and physical excision of the gonads, the effects of chemical castration are generally characterized by their reversibility; physiological functions typically resume once the pharmacological regimen is suspended. In contrast, surgical intervention produces a definitive and permanent cessation of reproductive and sexual capacity. Chemical castration specifically seeks to attenuate the offender's sexual libido and curb habitual deviant behaviors that may precipitate the commission of further offenses. Consequently, within several modern legislative frameworks, this procedure is classified as a preventive or therapeutic measure proposed to convict as a condition for parole, while other systems have institutionalized it as a supplementary or alternative sanction within the functional hierarchy of criminal punishment.[2]

1.1 Definition and differentiation of chemical castration from other sanctions

In its technical and jurisprudential sense, chemical castration refers to the strategic deployment of specific medicinal or hormonal substances that induce either a temporary or prolonged suppression of sexual desire in the perpetrator. This is particularly targeted at those convicted of heinous crimes such as rape or sexual aggression against children, with the overarching goal of preventing future criminal recidivism.

1 Miftahzen, H. R., Kamila, S. (2025). Chemical castration punishment: An international human rights law perspective. Realism: Law Review, 3(1), 18.

2 Lee, J. Y., Cho, K. S. (2013). Chemical castration for sexual offenders: Physicians' views. Journal of Korean Medical Science, 28(2), 171–172.

Legal scholars emphasize the distinction between chemical and surgical methods: the former is limited to a medico-pharmacological intervention that regulates hormonal secretions specifically testosterone without compromising the anatomical integrity or physical structure of the human body.[3] This non-invasive nature has provided a jurisprudential justification for various legislatures to adopt it as a therapeutic-preventive measure rather than a traditional punitive sanction.

This mechanism has been institutionalized in several sovereign states that have enacted specialized legislation for sex offenders against minors, including Poland, the Czech Republic, the Russian Federation, South Korea, and various jurisdictions within the United States. Consequently, it has become the focal point of a rigorous ethico-legal debate concerning its legitimacy and its compatibility with fundamental human rights principles, most notably the right to bodily integrity and human dignity.

Furthermore, a distinction must be drawn between chemical castration and other rehabilitative measures. Unlike standard psychiatric treatments, chemical castration does not necessarily aim to cure a clinical mental disorder in the traditional medical sense; rather, it often functions as a coercive judicial procedure imposed by court order or as a prerequisite for early release. It likewise differs from Psychosexual Therapy, which focuses on behavioral modification through cognitive-behavioral programs without interfering with the body's endocrine system.

From a strictly legal perspective, chemical castration defies easy classification within the traditional taxonomies of punishment. It possesses a hybrid nature that intersects retribution with therapy, and coercion with prevention. Some legislatures categorize it as a Security-Therapeutic Measure, whereas others view it as an Accessory Penalty added to custodial sentences. For instance, Polish Law No. 240/2009 mandates the submission of sex offenders against children to chemical castration following a mandatory consultation with a specialized medical board. Conversely, in the United States, several states apply it under the Informed Consent model as a condition for parole, where the offender theoretically chooses the treatment over continued incarceration.[4]

In the context of Islamic Jurisprudence, castration is not recognized as a standardized Sharia sanction. The general principles of Islamic law emphasize the sanctity and inviolability of the human body, prohibiting any physical alteration or harm except in cases explicitly mandated by divine text, such as Qisas. Thus, the introduction of chemical castration may clash with the principle of the sanctity of the body, which Muslim jurists have affirmed by stating that the body is a trust, that neither the individual nor the state may infringe upon without legitimate scriptural justification.[5]

1.2 Historical and intellectual evolution of chemical castration

Castration is not a novel concept in the history of punitive systems; its origins can be traced back to ancient civilizations, including the Babylonian, Greek, and Roman eras, where physical castration was utilized as a retributive penalty for adultery, treason, or crimes of honor. However, with the evolution of humanistic thought and the rise of reformist movements in the 18th century, physical castration receded in favor of custodial imprisonment.

The surge in sexual offenses against children in the late 20th century reignited the debate over the efficacy of traditional penalties. The perceived failure of general and specific deterrence provided by mere incarceration, coupled with high recidivism rates, led to

3 Schmucker, M., Lösel, F. (2008). Does sexual offender treatment work? A systematic review of outcome evaluations. Psychological Bulletin, 13(1), 97–127.

4 Mohamadi, I. (2022). Modern trends of the punitive policy in facing sexual crimes. Journal of Contemporary Legal Studies, (27), 45–67.

5 Al-Zuhayli, W. (2006). Islamic jurisprudence and its evidence (4th ed.). Dar al-Fikr. Cairo, 185.

the conceptualization of chemical castration. It first appeared in medical literature in the 1950s, specifically using medroxyprogesterone acetate to treat sexual obsessions. By the late 1980s, it transitioned into legal application in California and Florida as a condition for parole. At the dawn of the 21st century, Eastern European nations began legislative adoption (Poland in 2009, the Czech Republic in 2010), largely driven by public outcry following high-profile pedophilic incidents. These nations framed the procedure as Mandatory Medical Treatment to bypass constitutional objections to corporal punishment. Meanwhile, Western European nations, such as France and Germany, remain significantly more reserved, viewing chemical castration as a potential violation of Article 3 of the European Convention on Human Rights. This perspective is reinforced by the standards set by the European Committee for the Prevention of Torture (2017) regarding the medical treatment of detainees.[6]

1.3 Medical, scientific, and jurisprudential nature

From a scientific standpoint, the procedure relies on GnRH agonists or anti-androgens such as Leuprolide or Cyproterone Acetate. These are administered through periodic injections to significantly lower sexual activity and aggressive libidinal impulses. Empirical studies suggest that the effects are transient and diminish upon the cessation of treatment, rendering it a reversible measure, unlike the finality of surgical intervention.[7]

Medical professionals emphasize that chemical castration is a physiological tool for impulse control rather than a comprehensive psychological cure. Therefore, medical associations recommend its integration into a Multimodal Treatment Program that includes psychological and behavioral counseling. Field experiments in Sweden and South Korea have demonstrated that recidivism rates among those subjected to chemical castration decreased by approximately 30% to 40% compared to those who only served custodial sentences, proving its efficacy as a preventive measure provided it is subject to strict judicial and medical oversight.[8] Recent comparative legal analyses[9] and international reviews of legislation[10] suggest that the success of such measures depends on rigorous adherence to international human rights frameworks

Ultimately, this sanction/measure is anchored in two complementary principles of modern criminal jurisprudence: the Principle of Deterrence and the Principle of Social Protection. From a deterrent perspective, it is viewed as a rigorous response that generates a profound psychological impact on both the offender and society. From a preventive perspective, it serves as a functional tool to neutralize the biological drivers of crime. Nevertheless, it continues to raise fundamental questions regarding the boundaries of state authority in interfering with the human body. While some argue the state has a Right of Defense against dangerous criminals, others maintain that bodily integrity is the essence of human dignity and cannot be treated as a mere instrument of penal policy.

6 European Committee for the Prevention of Torture (CPT). (2017). 27th General Report of the CPT. Council of Europe.

7 Thibaut, F., De La Barra, F., Gordon, H., Cosyns, P., Bradford, J. M. (2019). The World Federation of Societies of Biological Psychiatry (WFSBP) guidelines for the biological treatment of paraphilias. The World Journal of Biological Psychiatry, No. 11, 604–655.

8 Kim, S., Cho, S. (2010). Chemical castration for sexual offenders in Korea: Analysis and proposal for legislation. Korean Journal of Legal Medicine, No. 34, 101–110.

9 Sugiana, D., Rosmery, M., Amalia, R. (2022). Analysis of chemical castration punishment for sexual crimes perpetrators in view of human rights (Case study of sexual harassment of 14 Santriwati in Bandung Regency). Journal of Citizenship, 6(1).

10 Çöpür, M., Çöpür, S. (2021). Chemical castration as an evolving concept: Is it a possible solution for sexual offences? The Journal of Forensic Psychiatry & Psychology, 32(1), 1–26.

2. THE LEGAL NATURE OF CHEMICAL CASTRATION: THE DIALECTIC BETWEEN CRIMINAL SANCTION AND PREVENTIVE MEASURE

Modern criminal jurisprudence maintains a fundamental and structural distinction between Punishment, viewed as a retributive sanction for a criminalized act, and Preventive Measures, conceptualized as functional instruments designed to shield society from criminal dangerousness. While punishment is intrinsically linked to the Principle of Guilt, preventive measures are anchored in the element of future risk or threat. The eminent jurist Mirabeau elegantly articulated this dichotomy by stating: Punishment is justified by the past, while the preventive measure is justified by the future. This distinction is paramount in determining the precise positioning of chemical castration within the hierarchical punitive system.[11] When scrutinizing the core of the chemical castration procedure, we observe a duality: it is imposed following a judicial finding of guilt and via a court verdict characteristic that aligns it with traditional punishment. However, if we examine its ultimate teleological objective, namely, the prevention of future recidivism, it qualifies as a preventive measure par excellence.

2.1 Chemical castration as a criminal sanction

Within several legislative frameworks, chemical castration is formally recognized as a punitive sanction that either integrates with custodial sentences or partially replaces them. For instance, in the jurisdiction of California, Law No° 794 of 1996[12] stipulates that any individual convicted of the rape of a child may be subjected to chemical castration as a mandatory condition for parole. From the perspective of criminal retribution, this measure serves as a deterrent mechanism specifically tailored for a category of offenders characterized by a high probability of recidivism. Proponents of this punitive orientation rely on the Principle of Proportionality between the crime and the penalty. They argue that since an assault against a child constitutes a profound violation of society's collective moral fabric, the law's intervention into the offender's biological body is justified as a reciprocal measure to prevent further violations of potential victims' physical integrity. Nevertheless, this purely retributive characterization faces significant opposition. For example, French law, while permitting the administration of libido-suppressing agents, mandates the informed consent of the convict and classifies the procedure strictly within the framework of Psychosexual Treatment, explicitly denying it the status of a criminal penalty. This reflects a significant jurisprudential trend toward depenalizing chemical castration.[13] As argued by Hess et al, the ethical debate remains unresolved in European jurisprudence, particularly concerning the balance between social security and human rights.[14]

2.2 Chemical castration as a preventive measure

Preventive measures in modern criminal thought aim to protect the social order from criminal dangerousness, irrespective of the offender's total criminal responsibility. The scholar Zimring defines them as precautionary procedures imposed upon those whose dangerousness is established in order to preclude

11 Ahmed, M. (2020). Alternative sanctions in contemporary criminal policy: A comparative study between precautionary measures and custodial penalties. Dar al-Nahda al-Arabiya.

12 Law of California No. 794, September 21, 1996, Chemical Castration of Sex Offenders.

13 French Ministry of Justice. (2020). Report on the implementation of preventive measures and sanctions against perpetrators of sexual crimes in France. General Directorate of Criminal Affairs and Pardons.

14 Ohoiwutun, Y. A. T., Putra, G. A., Taniady, V. (2026). Integrating psychiatric assessment in chemical castration sanctions for child sexual offenders in Indonesia. Sriwijaya Law Review, 10(1), 109–125.

their return to criminal conduct.[15] Within this intellectual framework, many jurists perceive chemical castration as a physiological tool to regulate sexual impulses, aligning it more closely with Medical Preventive Measures typically imposed on individuals with psychological disorders that pose a threat to public safety.

In this regard, the European Court of Human Rights (Strasbourg) explicitly supported this orientation in the landmark case of Kudla v. Poland (2000). The court clarified that therapeutic interventions do not constitute treatment provided they are genuinely aimed at treatment and are conducted under the strict supervision of an independent medical authority. However, the demarcation line between and remains exceptionally thin and continues to be a subject of intense legal debate.

2.3 Legal differentiation and systematic classification

In its technical and jurisprudential sense, chemical castration refers to the strategic deployment of specific medicinal or hormonal substances that induce either a temporary or prolonged suppression of sexual desire in the perpetrator. This is particularly targeted at those convicted of heinous crimes such as rape or sexual aggression against children, with the overarching goal of preventing future criminal recidivism.

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2.3.1 The formal criterion

This criterion focuses on the procedural foundation of the measure. A Punishment cannot be imposed except through an explicit statutory text issued by the legislative authority in adherence to the Principle of Legality and can only be enacted via a final judicial verdict following a definitive finding of guilt. In contrast, the Preventive Measure is characterized by greater procedural flexibility; it may be instituted even in the absence of a formal conviction, provided there are clear indicators of criminal risk or the likelihood of recidivism, as seen in therapeutic measures for those lacking full criminal capacity, such as the mentally ill.[17]

15 Zimring, F. E. (2019). The changing legal world of adolescence. Oxford University Press.

16 Schmucker, M., Lösel, F. (2008). Does sexual offender treatment work? A systematic review of outcome evaluations. Psychological Bulletin, 13(1), 97–127.

17 Abu al-Khair, S. (2021). Precautionary measures in contemporary criminal policy: A study in concept, legal nature, and practical effects. Dar al-Matbouat al-Jami'iyah.

2.3.2 The functional criterion

This involves identifying the primary objective of the procedure. Punishment is an embodiment of retribution for guilt; it is a social reaction to criminal conduct intended for general and specific deterrence and the realization of justice through desert. Conversely, the Preventive Measure seeks neither retribution nor deterrence in the traditional sense, but rather the Prophylaxis of future danger. It targets the future by addressing the psychological or behavioral catalysts of crime to protect society.[18]

2.3.3 The objective criterion

This rests on the nature of the effect the measure has on the individual. Punishment, by its very nature, inflicts pain, hardship, or deprivation, whether of liberty, property, or bodily autonomy. The Preventive Measure, however, aims at reform, rehabilitation, or clinical stabilization. Its foundation is rather than Blame, and its intent is not to cause suffering but to neutralize the threat posed by the individual.

3. LEGAL IMPEDIMENTS TO THE IMPLEMENTATION OF CHEMICAL CASTRATION WITHIN THE ALGERIAN LEGAL SYSTEM

Currently, the Algerian legislator has not formally integrated chemical castration into its punitive arsenal. However, a significant and escalating debate has emerged following recurrent and harrowing cases of sexual assault against minors. Public discourse has increasingly demanded the adoption of such measures, notwithstanding the substantial legal contradictions they present. Article 34 of the Algerian Constitution explicitly mandates that the State shall protect the inviolability of the person and their bodily integrity; no person shall be subjected to torture or inhuman treatment in the Constitutional Amendment, 2020.[19] Furthermore, Article 38 emphasizes that the primary objective of penalties is rehabilitation and social reintegration rather than mere retribution. Consequently, any future legislative initiative aimed at legalizing chemical castration must meticulously balance the collective right to social security with the individual's fundamental right to physical sanctity. This section elucidates the constitutional, human rights, and practical obstacles facing Algerian criminal policy in this regard.

3.1 Constitutional obstacles to chemical castration

The legal nature of chemical castration reflects an evolution in the concept of criminal sanctioning toward an intersection with clinical medicine and preventive science. It is a hybrid procedure that merges punishment with treatment and deterrence with reform. In modern legal systems, it cannot be accepted unless it resides within a framework that respects constitutional mandates and human dignity, subject to rigorous judicial and medical oversight.

3.1.1 Chemical castration and the principle of criminal legality

The Principle of Legality is the cornerstone of any penal system. Article 167 of the 2020 Algerian Constitutional Amendment stipulates that Criminal penalties shall be subject to the principles of legality and personality. This is translated in Article 1 of the Penal Code:[20] "No crime, no penalty, and no security measure shall exist without a law". Furthermore, Article 39 of the Constitution prohibits any physical or moral violence or any infringement upon dig-

18 Abdul Ghani, K. (2019). The general theory of punishment in criminal law: A study in the philosophical and functional foundations of punishment and precautionary measures. Dar al-Fikr al-Jamaii.

19 Law No. 20-16, December 30, 2020, containing the Constitutional Amendment, Official Gazette N 82.

20 Ordinance No. 66-156, June 8, 1966, Algerian Penal Code, (as amended and supplemented).

nity. Introducing chemical castration as a new sanction raises profound questions regarding its harmony with these principles, especially as it oscillates between a compulsory medical procedure and a punitive retribution. In this context, the World Health Organization (2015) underscores the critical ethical considerations involved in medical treatments that significantly affect the biological and bodily integrity of individuals.[21]

The constitutionalization of legality aims to protect individuals from legislative arbitrariness and the expansive interpretation of penal texts. Since chemical castration is absent from the existing Algerian penal repertoire, its adoption would necessitate an explicit, detailed legislative amendment defining its nature, duration, executive authority, and procedural safeguards to avoid violating the principle of non-retroactivity of laws.[22] Similar challenges have arisen in Poland and the Czech Republic, where the constitutionality of such laws was challenged for infringing upon bodily integrity.[23]

3.1.2 Respect for bodily integrity and human dignity

The right to physical sanctity is an absolute constitutional right. Article 39 of the Algerian Constitution forbids all forms of torture or degrading treatment. Subjecting an offender to chemical treatment that alters their physiological functions constitutes, in principle, an infringement upon bodily integrity unless performed with free and informed consent under independent medical supervision. The constitutional risk lies in transforming a therapeutic measure into a retributive mutilation, rendering it a form of legalized physical distortion. Some constitutionalists argue this contradicts Article 7 of the International Covenant on Civil and Political Rights,[24] which prohibits non-consensual medical treatment (UN Human Rights Committee, 2018). Conversely, others argue that since it is reversible and non-surgical, it is more humane than long-term incarceration or capital punishment.[25]

3.1.3 The principle of proportionality

Legality requires that a penalty be proportionate to both the gravity of the act and the personality of the offender. While theoretically justified by the severity of crimes against children, applying chemical castration without prior psychological profiling and medical guarantees could turn it into a collective penalty that infringes upon the offender's right to reintegration. The French Constitutional Council (2010) emphasized that any measure affecting the human body must remain subject to voluntary and continuous consent.

3.2 Human rights and ethical impediments

3.2.1 Contradiction with international standards

Instruments such as the Universal Declaration of Human Rights and the ICCPR serve as the supreme reference for evaluating sanctions. Moreover, the United Nations Human Rights Council clarifies that non-consensual medical interventions, such as compulsory chemical castration, must be strictly scrutinized to ensure they do not constitute cruel, inhuman, or degrading treatment. Articles 3 and 5 of the Declaration protect the right to life, liberty, and security of a person, prohibiting cruel treatment. Forced chemical castration may be deemed a form of inhuman treatment, inconsistent with international obligations. The UN Committee

21 World Health Organization. (2014). Health care for women subjected to intimate partner violence or sexual violence: A clinical handbook. <https://iris.who.int/server/api/core/bitstreams/3e906b26-c609-4a2f-9cf6-c1c42f186809/content>.

22 Boucheir, A. (2021). The Algerian constitutional system after the 2020 amendment. Office of University Publications (OPU).

23 Smith, J. (2019). Criminal law and human rights in modern justice systems. Oxford University Press.

24 United Nations Human Rights Council. (2019). Report on the protection of human dignity in criminal sanctions. <https://undocs.org/A/HRC/42/20>.

25 Berger, R. (2020). Chemical castration and human rights: Legal and ethical perspectives. Cambridge University Press.

Against Torture has stated that in the absence of free consent,[26] this procedure represents a violation of Article 16 of the Convention.[27]

3.2.2 The ethical dilemma: state vs. body

A philosophical question arises: To what extent can the state interfere with the human body in the name of public safety? Excessive control over the body leads to a violation of bodily liberty. Using the body as an instrument of deterrence risks opening the door to other regressive legislations, such as organ removal or forced medical implants, threatening the balance between security and freedom, a concept famously critiqued by Michel Foucault in his analysis of power and punishment.[28]

3.2.3 Rights to treatment and dignity

Under the Nelson Mandela Rules, convicts do not lose their right to dignity or healthcare. If chemical castration were imposed, it must be under an independent medical board and with the offender's consent. Forcing treatment is a direct violation of Article 10 of the ICCPR,[29] which mandates that all persons deprived of their liberty shall be treated with humanity.

3.2.4 Practical and rights-based challenges in Algeria:

- Absence of National Framework: The lack of specific legislation makes implementation vulnerable to judicial arbitrariness;
- Lack of Specialized Cadres: Algeria currently lacks sufficient medical-legal expertise to supervise such complex hormonal interventions;
- Risk of Misuse: Potential for misuse in social or political contexts against marginalized groups;
- Supervision: The absence of independent medical-judicial oversight could lead to grave human rights violations.

3.3 Position of Algerian jurisprudence

While Algerian legal scholars have yet to reach a definitive consensus, many incline toward rejecting chemical castration because it is an unjustified breach of bodily integrity. They argue that deterrence can be achieved through aggravated custodial sentences and psychological security measures. This contrasts with comparative jurisprudence, which is split: a supporting trend viewing it as a preventive-therapeutic tool, and an opposing trend viewing it as a cruel, retributive practice that fails to address the root causes of criminality.

CONCLUSION

In conclusion, it can be asserted that the issue of chemical castration represents one of the most complex and sensitive legal and human rights dilemmas in contemporary jurisprudence. It reflects the intricate and often tense relationship between the collective imperatives of social defense and the fundamental constitutional obligation to respect inherent human dignity. This subject raises a core problematic concerning the boundaries of the State's punitive authority and the normative constraints that should govern legislative intervention when it pertains to the sanctity of the human body. The persistent tension between the preventive-prophylactic dimension of chemical castration and its punitive-deterrent character makes it exceptionally difficult to categorize within a singular legal framework, as it simultaneously embodies the characteristics of a criminal sanction and a therapeutic measure. Although grounded in the Algerian legal framework, the findings of this

26 United Nations Committee against Torture. (2008). General comment No. 2: Implementation of article 2 by States parties (CAT/C/GC/2). United Nations.

27 United Nations Human Rights Council (2019), op. cit.

28 Foucault, M. (1995). Discipline and punish: The birth of the prison. Vintage Books.

29 United Nations International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, Art. 10. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

study are transferable to other legal systems confronting similar debates on hybrid preventive sanctions, particularly in jurisdictions balancing crime prevention with constitutional guarantees of human dignity.

Furthermore, this study reveals that the discourse surrounding chemical castration transcends purely legal considerations, extending into ethical, clinical, and sociological dimensions that touch upon the very heart of the philosophy of criminal justice. The debate remains polarized between those who perceive it as a progressive mechanism for offender rehabilitation and communal protection, and those who condemn it as an egregious violation of bodily integrity and the inviolability of the human person. The ultimate challenge remains the reconciliation of society's right to security with the individual's right to physical and moral autonomy, within the context of the rapid transformations characterizing modern criminal policy.

Research Findings

Through the systematic analysis conducted in this study, the following findings have been established:

- Hybrid Legal Nature: The analysis confirms that chemical castration is a hybrid procedure that amalgamates punitive, medical, and preventive characteristics. Formally, it is typically enacted via a judicial verdict; objectively, it inflicts a temporary physical deprivation; yet its primary teleological goal is preventive, aimed at the neutralization of criminal recidivism;
- Diverse International Outcomes: The study of varied international experiences, including Poland, the Czech Republic, Russia, the United States, and South Korea, demonstrates that when chemical castration is integrated with comprehensive rehabilitative programs and rigorous supervision, it leads to a statistically significant reduction in recidivism rates. However, these successes are accompanied by severe constitutional and human rights risks in instances of forced application or the absence of procedural safeguards;
- Constitutional and Human Rights Tensions: From a constitutional perspective, chemical castration raises fundamental issues regarding the Principle of Legality, the right to bodily integrity, and the sanctity of human dignity. It also intersects with Algeria's international obligations under the Convention Against Torture and other human rights instruments;
- Infrastructural Requirements: On a practical and clinical level, the implementation of any chemical castration program necessitates a specialized medical-judicial infrastructure, continuous clinical monitoring, and an independent assessment of the risk-benefit ratio, supported by scientific tracking systems;
- The Algerian Context: While chemical castration remains a debatable option in Algeria if framed as a voluntary, legally regulated therapeutic choice, it faces categorical opposition if applied coercively. Adopting it as a mandatory penalty is fraught with grave constitutional and human rights perils.

Recommendations and Proposals

Based on the aforementioned findings, the researcher proposes the following recommendations to the Algerian legislator and judicial authorities:

- **Avoidance of Mandatory Penalties:** We recommend abstaining from enacting mandatory chemical castration as a criminal penalty in response to populist or public pressure. Such a move would entail significant constitutional risks that conflict with the fundamental rights

enshrined in the Algerian Constitution and international conventions;

- **Establishment of a Voluntary Legal Framework:** Should the legislator consider this path, it must be within a strictly limited and optional framework. Chemical castration should only be offered as a voluntary, temporary therapeutic alternative and a condition for parole, provided it is requested by the convict freely and after exhausting other rehabilitative means;
- **Mandatory Informed Consent:** A prerequisite for any pharmacological intervention must be the explicit, written, and informed consent of the individual. This consent should only be valid after a comprehensive clinical briefing and the approval of a sworn psychiatrist, with the offender retaining the right to withdraw from treatment at any time without additional penal consequences;
- **Judicial Oversight and Due Process:** Any decision to apply this measure must be based on a final judicial verdict, supported by independent medical and psychological reports proving the danger of recidivism. Robust mechanisms for appeal and periodic judicial review must be available before a competent court;
- **Formation of a Multi-disciplinary Oversight Commission:** We propose the creation of an independent Medio-Judicial Committee comprising specialists (Psychiatrists, Urologists, Endocrinologists), legal experts, and human rights representatives. This commission would be tasked with evaluating cases, supervising the implementation, and submitting periodic reports to the judiciary;
- **Adherence to International Standards and Transparency:** Any legislation concerning chemical castration must demonstrate absolute compliance with the Convention Against Torture and the ICCPR. Transparency must be maintained through the publication of periodic reports accessible to international human rights mechanisms and the national public.

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მისამართი: გურამიშვილის გამზირი 76. თბილისი. 0141
ტელეფონი: (+995 32) 2 000 171 (120); (+995 596) 171 171

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