

The Contribution of Constitutional Judiciary to Legislative Drafting through the Mechanism of Interpretative Reservations

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Abstract

This study examines the contribution of constitutional judiciary to legislative drafting through the mechanism of interpretative reservations, which is regarded as a judicial technique that prevents the annulment of a legislative provision under constitutional review by correcting its deficiencies, clarifying ambiguities, and resolving potential issues that may arise during its implementation. The need for interpretation stems from cases of legislative deficiency or omission that fail to comply with the principles of sound and coherent legislative drafting or that partially conflict with the Constitution. Consequently, the intervention of the constitutional judge becomes necessary to remedy the defects of legislative texts so that they may be declared constitutional subject to the interpretative reservations imposed.

The Algerian constitutional judge has employed interpretative reservations in their various forms and has relied upon them in numerous constitutional decisions, even in the absence of an explicit constitutional provision establishing such authority. As the guarantor of constitutional supremacy, the constitutional judge interprets legislative texts through constructive, neutralizing, and directive reservations in order to correct legislative defects and ensure conformity with the Constitution. The exercise of this interpretative competence, however, requires clear rules governing the conditions and procedures for its application, particularly within the Rules of Procedure of the Constitutional Court.

Keywords: Constitutional Judge; Legislation; Interpretative Reservations; Legislative Drafting; Binding Force of Constitutional Interpretation.

Introduction

Legislative drafting is the outcome of a complex process that passes through several stages and involves various institutions with the aim of ensuring that legislative texts correspond to the prevailing social, political, and economic conditions of society. This objective can only be achieved through precision, clarity, and consistency in legislative language, thereby enabling the addressees of the law to understand and apply its provisions with ease and without ambiguity. Drafting legislation in accordance with established legislative drafting principles contributes to the regulation of social relations and reinforces the foundations of the rule of law. The constitutional judge exercises constitutional review over legal rules to ensure their conformity with constitutional provisions and the requirements of protecting individual rights and freedoms. Through constitutional adjudication, the constitutional judge establishes the principles of legislative drafting that the legislature must observe both in form and substance. Regardless of its nature, no legislative text may contravene constitutional principles or deviate from the objectives for which it was enacted. Nevertheless, the constitutional judge does not

replace the legislature but rather ensures the quality and constitutional conformity of legislative texts.

Constitutional judiciary has undergone significant development in its competencies as the guarantor of constitutional supremacy and constitutional justice. The role of the constitutional judge is no longer confined to declaring the constitutionality or unconstitutionality of the legislative text under review and identifying its deficiencies. It has expanded to include the authority to interpret legislative provisions and determine the legislative intent through the mechanism of interpretative reservations, which has been adopted in numerous legal systems to remedy defects in legislative drafting that may affect the quality and effectiveness of legislation.

The 2020 Algerian constitutional amendment introduced a fundamental transformation in the structure of constitutional justice by establishing the Constitutional Court in place of the Constitutional Council. It also broadened the Court's jurisdiction over constitutional review by expanding both the entities entitled to refer cases and the scope of constitutional review, which constitutes the Court's principal function. Furthermore, the constitutional legislator expressly incorporated the function of interpretation within the Constitutional Court's jurisdiction, although the constitutional judge had already exercised interpretative authority to identify legislative shortcomings and fill gaps left by the legislature.

Accordingly, the study of the contribution of constitutional judiciary to legislative drafting through the mechanism of interpretative reservations is of considerable importance. It seeks to examine the methods by which the Algerian constitutional judge exercises interpretative authority in light of the various interpretative approaches recognized in comparative legal systems, as well as the extent to which this newly recognized function enriches and clarifies legislative texts while ensuring a balance between the objectives pursued by the legislature and the requirements of constitutional justice within the framework of the rule of law.

Research Problem

Based on the foregoing, this study seeks to answer the following principal question:

To what extent do the interpretative reservations adopted by the Algerian constitutional judge contribute to legislative drafting?

This main question gives rise to the following subsidiary questions:

What is the significance of the constitutional judge's adoption of the mechanism of interpretative reservations in legislative drafting?

What are the principal examples of the Algerian constitutional judge's application of interpretative reservations?

What is the legal authority and binding force of interpretative reservations?

Research Methodology

Given the nature of the subject, this study adopts the descriptive-analytical method. It examines and analyzes the relevant legal texts and constitutional jurisprudence concerning the interpretative jurisdiction of the constitutional judge, while also defining and explaining the principal concepts addressed in the study.

Structure of the Study

To answer the research problem and achieve the objectives of this paper, the study is divided into two main sections:

First Section: The conceptual framework of interpretative reservations, including their definition, legal foundations, and practical significance in legislative drafting.

Second Section: The applications of interpretative reservations by the Algerian constitutional judge, focusing on the use of their various forms to ensure sound legislative drafting, as well as examining their legal authority and binding effect.

Section One: The Conceptual Framework of Interpretative Reservations

The interpretation of legislative texts constitutes a function that constitutional judges have developed and employed within the framework of constitutional review of legislation. This function does not entail interference with the legislature's discretionary authority; rather, it serves to remedy deficiencies in a legislative provision submitted for constitutional review through the mechanism of interpretative reservations. This mechanism enables the constitutional judge to avoid annulling the challenged provision—the most severe consequence of unconstitutionality—while allowing the legislature to rectify the identified defects and shortcomings by complying with the reservations expressed by the court.

The mechanism of interpretative reservations first emerged in comparative constitutional systems, where it has taken various forms with the objective of enriching and clarifying the content of legislative provisions. Influenced by this comparative approach, the Algerian constitutional judge adopted and applied this technique in the exercise of constitutional review before it was expressly enshrined in the provisions of the Constitution.

This section examines the concept of interpretative reservations (First) and their practical significance in legislative drafting (Second).

First: The Concept of Interpretative Reservations

The constitutional judge has moved beyond the traditional role of merely reviewing the constitutionality of legislation and has developed mechanisms aimed at avoiding confrontation with the legislative authority responsible for enacting legal norms. One such mechanism is the use of interpretative reservations, through which the constitutional judge identifies constitutional defects while reinforcing his position as the guarantor of respect for the rule of law.

Accordingly, this part addresses the definition of interpretative reservations as well as their doctrinal and legal foundations.

1. Definition of Interpretative Reservations

Interpretation is an inseparable element of the application of legal rules. Just as an ordinary judge must interpret a legal provision before applying it to the dispute before the court, the constitutional judge must likewise interpret the provision under constitutional review. Interpretation is therefore an essential judicial function and one of the judiciary's most significant instruments. In this regard, the jurist Hans Kelsen observed that: "The application of the law inevitably requires the interpretation of its provisions."¹

Dr. Saïd Boulachair defines the interpretation of a constitutional provision—or any provision possessing constitutional value—as the process undertaken by the constitutional judge to determine the meaning of the provision under interpretation by attributing to it a normative character. Such interpretation guides judicial decisions in applying the relevant provision, either by merely determining its meaning or by supplementing it with interpretative reservations.²

Similarly, the constitutional scholar Louis Favoreu, in explaining decisions of conformity subject to constitutional reservations, considers them to be decisions rejecting a constitutional challenge while attaching interpretative reservations that preserve the constitutionality of the law. In one of his writings, he defines them as: "Decisions rejecting constitutional challenges accompanied by reservations that condition the constitutionality of the law."³

The technique of declaring a legislative provision constitutional subject to interpretative reservations makes it possible to avoid annulment, which is regarded as a particularly severe sanction for unconstitutional legislation. It also prevents the repeated condemnation of the legislature, thereby reducing institutional tensions that may arise in the exercise of its constitutionally assigned legislative function. Consequently, in addition to the traditional negative role of the constitutional judge—namely, invalidating unconstitutional provisions—the judge now performs a more active function by declaring the challenged provision constitutional only on the condition that it is interpreted and applied in accordance with specific reservations.⁴

From the foregoing, it is evident that interpretative reservations constitute a mechanism for mitigating the consequences of annulling legislative provisions subjected to constitutional review. Through this mechanism, the constitutional judge avoids invalidating the challenged provision by identifying its shortcomings and providing appropriate interpretative guidance that clarifies its true legal meaning. This represents a modern and progressive development in constitutional adjudication, ensuring that the legislative authority adheres to the principles of proper legislative drafting in both form and substance, thereby reinforcing the foundations of the rule of law.

2-Origins of Interpretative Reservations:

Many legal systems have adopted the mechanism of constitutional reservations, including Algeria through the numerous jurisprudential decisions of the Constitutional Council, even before the interpretative jurisdiction of the constitutional judge was expressly enshrined by the 2020 Constitutional Amendment.⁵ This development forms part of the broader effort to strengthen the interpretative function and expand the scope of constitutional review in a manner that enhances the protection of rights and freedoms and reinforces the rule of law.

In the United States, ever since the emergence of the expression "government by judges," coined by American legal scholars in reference to constitutional adjudication, constitutional jurisprudence has continuously debated the limits of the constitutional judge's discretionary authority in interpreting constitutional provisions. This debate reflects the prominent position occupied by the American constitutional judiciary within comparative legal systems, where it has come to be regarded as a fundamental actor in constitutional life, to the extent of being described as a "second constitutional legislator" by virtue of its interpretative authority.⁶

European constitutional justice, on the other hand, has embraced some of the most advanced techniques of constitutional review. The Italian Constitutional Court developed a distinctive category of interpretative decisions, whether of acceptance or rejection, and introduced what are known as "interpretative orders" to modify the normative content of legislative provisions. The breadth of its authority in this field is demonstrated through its use of four principal techniques: restrictive interpretations, additive decisions, substitutive orders, and mandatory orders⁷.

Similarly, the German Federal Constitutional Court employed the principle of interpretation consistent with the Constitution for the first time in its decision of 7 May 1955. In the reasoning of that judgment, the Court held that a statute should not be regarded as unconstitutional so long as there exists an interpretation compatible with the Basic Law, maintaining that the statute retains its validity when such an interpretation is adopted.⁸

France, however, developed a different philosophy of constitutional interpretation by adopting the technique of "interpretative reservations." This technique enables the Constitutional Council to declare a contested legislative provision constitutional, provided that it is applied in the manner prescribed by the Council through its interpretation. It is noteworthy that the French Constitutional Council began using this technique almost one year after its establishment. Initially applied in reviewing the internal rules of Parliament, it was subsequently extended to the constitutional review of legislative texts.⁹

In Egypt, the Constitution of 1971 expressly conferred upon the Supreme Constitutional Court the jurisdiction to interpret legislative texts, providing that: "The Supreme Constitutional Court shall exclusively exercise judicial review over the constitutionality of laws and regulations and shall interpret legislative provisions, all in the manner prescribed by law." This jurisdiction was reaffirmed under Article 192 of the 2014 Constitution. The Court's interpretative competence extends to legislative texts enacted by the legislative authority, whether ordinary or organic laws, in addition to decree-laws issued by the President of the Republic in accordance with the provisions of the Constitution.¹⁰

In Algeria, the various Constitutions and their amendments prior to 2020 did not expressly confer upon the constitutional judge the authority to interpret legislative provisions, despite the fact that the Constitutional Council was entrusted with ensuring respect for the Constitution.¹¹ This constitutional mandate constituted the basis upon which the Council exercised the function of constitutional interpretation within the framework of constitutional review, notwithstanding the absence of an explicit constitutional provision granting it such competence.¹² However, the 2020 Constitutional Amendment expressly recognized this interpretative jurisdiction, drawing inspiration from the comparative constitutional models previously discussed. Article 192 provides as follows:

"The Constitutional Court may be seized by the authorities specified in Article 193 below concerning disputes that may arise between the constitutional authorities.

These authorities may also refer to the Constitutional Court questions relating to the interpretation of one or more constitutional provisions, and the Constitutional Court shall issue an opinion thereon."

The conferral upon the Algerian Constitutional Court of the power to interpret constitutional provisions, as well as to adjudicate disputes concerning conflicts of jurisdiction, constitutes a matter of paramount importance. It enables the constitutional judge to unify constitutional interpretation and prevent jurisdictional conflicts, thereby reinforcing the principle of the rule of law and fulfilling the requirements of constitutional justice.

Secondly: The Importance of Interpretative Reservations in Legislative Drafting

Through the mechanism of constitutional interpretative reservations, the constitutional judge contributes to the legislative drafting process in a manner that ensures the proper regulation of legal and social relations. Such an objective can only be achieved by guaranteeing the quality

of legislative texts enacted by Parliament within the limits of its constitutional powers and in accordance with the prescribed formal and procedural requirements, thereby preventing legislative defects that may undermine their constitutionality.

The significance of interpretative reservations in legislative drafting may be highlighted as follows:

1) Strengthening Parliamentary Performance

The constitutional legislator has affirmed Parliament's role in the enactment of legislation alongside the executive authority's right of legislative initiative. Pursuant to this constitutional competence, the legislative authority is entrusted with establishing the legal framework governing the various fields of legislation specified by the Constitution,¹³ while ensuring that enacted laws remain consistent with constitutional provisions so as to avoid the sanction of annulment on constitutional grounds.

The mechanism of interpretative reservations is founded upon the constitutional presumption of constitutionality, which assumes that the legislature intends to comply with the Constitution. French constitutional jurisprudence considers interpretative reservations to be an instrument of dialogue between the Constitutional Council and the legislative authority. Through this mechanism, the constitutional judge avoids direct confrontation with Parliament, rendering decisions that are more balanced and less severe than declarations of unconstitutionality, while simultaneously encouraging the legislature to respect constitutional requirements through the adoption of the interpretation prescribed by the constitutional court.¹⁴

Accordingly, interpretative reservations reinforce parliamentary performance by conditioning the constitutionality of a defective legislative provision upon an interpretation that removes the element giving rise to constitutional invalidity. This is achieved by requiring the delegated authority to comply with constitutional requirements, while allowing the constitutional court to formulate such requirements in the form of an authoritative interpretation of the challenged provision, thereby preserving Parliament's legislative competence.¹⁵

2) Ensuring the Quality of Legislation

Following the establishment of constitutional review, legislators have increasingly sought to produce high-quality legislative texts, aware that constitutional review may require legislative provisions to be reformulated in order to ensure clarity and precision. Consequently, the role of the constitutional judge has expanded beyond merely declaring legislation constitutional or unconstitutional. It now encompasses clarifying the meaning and scope of legislative provisions, thereby emphasizing the importance of interpretative reservations in refining legislative drafting, ensuring conformity with the Constitution, and safeguarding legal certainty.¹⁶

Legislative deficiency is regarded as one of the inherent characteristics of legal texts, as the legislator may fail to encompass all issues related to a given subject or the prevailing circumstances within society. Therefore, the interpretation provided by the constitutional judge is considered essential to remedy this deficiency and enhance the quality of legislative drafting.

3) Strengthening the Protection of Rights and Freedoms:

The constitutional framers are responsible for enshrining rights and freedoms in the Constitution while entrusting the legislature with regulating them through the enactment of laws and the establishment of limitations on their exercise. Such limitations are intended to strike a

balance between individuals' enjoyment of their rights and freedoms and the requirements of preserving public order. Constitutional judicial review constitutes one of the most significant guarantees for protecting the system of rights and freedoms in society, particularly with regard to ensuring coherent and unambiguous legal drafting.

An analytical examination of interpretative reservations in constitutional jurisprudence demonstrates that their most fertile field lies in the legal rules governing public freedoms through defining the limits of regulatory authority. By obliging administrative authorities to comply with certain constitutional principles, such reservations restrict the exercise of discretionary powers in a manner that reinforces the protection of public freedoms.¹⁷

Accordingly, the mechanism of interpretative reservations constitutes an important instrument that enables the constitutional judge to play a positive role in safeguarding rights and freedoms. Through this mechanism, the judge may review legislative acts in a manner that reflects the constitutional protection afforded to the entire system of rights and freedoms. This objective is achieved by empowering the constitutional judge to eliminate legislative ambiguity, particularly during the preventive constitutional review conducted before the promulgation of legislation. In this context, the constitutional judge serves as a safeguard by clarifying the meaning of legislative provisions and preventing arbitrary interpretations by those to whom they are addressed.¹⁸

Section Two: Applications of the Mechanism of Interpretative Reservations by the Algerian Constitutional Judge

The Algerian constitutional judge has adopted the mechanism of interpretative reservations in order to mitigate the severity of constitutional review over legislative texts submitted for examination and to avoid declaring unconstitutional those provisions that merely suffer from deficiencies in legislative drafting. Consequently, the Constitutional Council promptly employed this mechanism in its various forms by intervening to identify and clarify the reservations that the legislature is required to observe.

Interpretative reservations enable the constitutional judge to play a prominent role in legislative drafting owing to their binding legal force. Accordingly, the legislative authority is obliged to adhere to the interpretations established by the Constitutional Court, which are intended to clarify the meaning of legislative provisions, remove ambiguity, ensure the realization of the legislature's intended objectives, and strengthen constitutional justice.

This section examines the use of the mechanism of interpretative reservations in Algerian legislative drafting (First), followed by the binding authority of interpretative reservations issued by the constitutional judge (Second).

First: The Use of the Mechanism of Interpretative Reservations in Algerian Legislative Drafting

Constitutional scholarship classifies the interpretative reservations employed by constitutional judges in interpreting legislative texts into three categories: constructive interpretation, neutralizing interpretation, and directive interpretation. The Algerian constitutional judge has relied upon these interpretative methods in several constitutional decisions, as illustrated below.

1) Constructive Interpretation (L'interprétation constructive)

Also referred to as creative or additive interpretation, constructive interpretation denotes an interpretative approach that introduces an additional formulation into the legislative text so as

to render it consistent with the Constitution, or supplements it in a manner that confers the constitutionally intended meaning upon the provision under constitutional review.¹⁹ In other words, it provides a constitutionally compliant interpretation of a defective legislative provision with the aim of preserving its validity within the legal system.²⁰

The constitutional scholar Favoreu defined this interpretative approach as one that confers upon the legislative text a constitutional character, thereby rendering it compatible with the Constitution. Consequently, judgments based on this method are known as additive judgments (Additives). This constructive approach may also result in deriving a legal rule from the text that differs from its apparent meaning. For this reason, judgments founded on this method are also referred to as substitutive judgments (Substitutives), and this approach has been adopted by several constitutional courts.²¹

A constitutional judge, while examining the constitutionality of a legal provision submitted for review, may encounter a provision that is inconsistent with the Constitution or affected by ambiguity, which could justify the annulment of the entire text. Instead of invalidating the provision, however, the judge may assign it an interpretation consistent with the Constitution by modifying or correcting its meaning.²² This form of interpretation constitutes one of the most significant methods of constructive interpretative reservation employed by the constitutional judge to refine legislative drafting. Through this approach, the judge assumes a law-making role by remedying deficiencies in the legislative provision and bringing it into conformity with constitutional requirements. At the same time, this mechanism avoids declaring the legislative provision unconstitutional, as the deficiency can instead be corrected and completed in accordance with the reservations expressed by the constitutional judge.

Among the examples illustrating the use of the constructive interpretative reservation by the Algerian constitutional judge are the following:

A. Review of the Constitutionality of the Organic Law Determining the Organization and Functioning of the National People's Assembly and the Council of the Nation, as well as the Functional Relations Between Them and the Government

The constitutional judge applied the mechanism of constructive interpretative reservation when examining Article 24 of the Organic Law governing the organization and functioning of the National People's Assembly and the Council of the Nation, as well as the functional relations between them and the Government,²³ which had been referred for constitutional review. The judge held that the legislature intended, through this provision, to specify the situations in which a bill or legislative proposal would be inadmissible, namely by establishing three (03) distinct grounds for inadmissibility. However, the omission of the conjunction "or" before the phrase "has been rejected" was found to create ambiguity regarding the legislature's intended meaning in defining the cases in which a bill or legislative proposal should not be accepted. The constitutional judge considered this omission to be a drafting oversight that required correction. This application of constructive interpretative reservation demonstrates the constitutional judge's role in addressing legislative omission through positive intervention aimed at correcting the text and filling the legislative gap without declaring the provision unconstitutional. This type of interpretation is commonly referred to as additive (or supplementary) constructive interpretation, as it seeks to remedy legislative deficiencies and enrich the content of the provision so that it fully complies with the Constitution.

B. Review of the Constitutionality of the Organic Law Relating to the High Independent Authority for Election Monitoring

The constitutional judge also addressed a case of legislative omission while reviewing Article 4 of the Organic Law relating to the High Independent Authority for Election Monitoring for its conformity with the Constitution.²⁴ The judge held that, by designating the headquarters of the High Authority in the city of Algiers, the legislature had overlooked the powers vested in the President of the Republic during a state of emergency under the provisions of paragraph 3 of Article 107 of the Constitution. This was particularly significant given the Constitutional Council's established jurisprudence affirming the principle that the constitutional powers of the President of the Republic must not be disregarded in matters concerning the distribution of constitutional competences. Consequently, the constitutional judge required the provision to be redrafted to ensure its conformity with the Constitution, so that it would read as follows:

"Subject to the provisions of Article 107 of the Constitution, the headquarters of the High Authority shall be located in the capital city of Algiers."

C. Review of the Compliance of the Rules of Procedure of the Council of the Nation

The Constitutional Council held that, by using the term "dispatch" (ifād) in Article 52 of the Rules of Procedure of the Council of the Nation and by adopting the procedure whereby a standing committee submits a request for the dispatch of a temporary fact-finding mission, the Council of the Nation failed to faithfully reflect the constitutionally established term "establishment" (tashkīl). In Opinion No. 02, the Constitutional Council stated:²⁵

"...It has thus attributed a meaning different from that contained in Article 134 (paragraph 2) of the Constitution and inconsistent with the intended meaning of Article 52 of the Rules of Procedure that is the subject of the referral, which provides for the possibility of the standing committee establishing a temporary fact-finding mission."

The Constitutional Court required that this drafting deficiency be remedied by replacing the term "dispatch" with the constitutionally enshrined term "establishment", in order to avoid any ambiguity and ensure that the legal rule conforms to constitutional requirements without leading to a declaration of the unconstitutionality of the provision. This form of interpretation is referred to as substitutional interpretative reservation.²⁶

2) Neutralizing Interpretation (L'interprétation neutralisante)

Neutralizing interpretation ²⁷is defined as the interpretative technique through which the harmful effects affecting the provisions submitted to the Constitutional Court for constitutional review are eliminated in order to avoid declaring them unconstitutional. This is achieved by removing the defective elements and demonstrating that the meaning conveyed by the wording of the provision is devoid of any legal effect.²⁸

Dr. Saïd Boulachair, on the other hand, considers that neutralizing interpretation aims to deprive the disputed legislative provision of certain legal effects or to exclude meanings that are contrary to constitutional principles, thereby eliminating their adverse consequences.²⁹ Accordingly, the objective of such interpretative reservations is to diminish, either wholly or partially, the binding force of the legislative provision.³⁰

Among the examples illustrating the Algerian Constitutional Court's use of neutralizing interpretative reservations are the following:

A. Review of the Constitutionality of the Ordinance Containing the Organic Law on the Electoral System

The Constitutional Court may intervene through the mechanism of neutralizing interpretative reservation to exclude provisions tainted by constitutional defects, as illustrated in its review of the constitutionality of the Ordinance containing the Organic Law on the Electoral System.³¹ It observed that Article 224 of the Ordinance under review provides:

"The Bureau of the Council shall declare the vacancy of the seat of the elected member of the Council of the Nation and shall immediately notify the Constitutional Court thereof for the purpose of declaring the vacancy and appointing a replacement for the elected member."

The legislature, however, failed to take into account that election to the Council of the Nation is conducted by indirect suffrage and that candidacy is submitted on an individual basis rather than through electoral lists, as is the case for elections to the People's National Assembly. Consequently, the replacement of an elected member of the Council of the Nation must be carried out through partial elections in accordance with the provisions of the Constitution and the Organic Law on the Electoral System.

The Constitutional Court held that the final phrase of Article 224, namely "appointing a replacement for the elected member," constituted a legislative oversight that had to be corrected. As a result, this phrase was deleted from the revised wording of the article in order to ensure consistency with the Constitution and eliminate its adverse legal effects.

B- Review of the Constitutionality of the Organic Law Amending and Supplementing Organic Law No. 98-01 of 30 May 1998 on the Jurisdiction, Organization and Functioning of the Council of State

The Constitutional Court noted, with regard to Article 1 of the organic law referred to it for review,³² a defect relating to the use of a term that does not appear in the Constitution. Article 1 provides that: "The purpose of this Organic Law is to define the jurisdiction, organization, and functioning of the Council of State in accordance with the provisions of Article 179 of the Constitution." Once again, the legislature failed to adhere to the terminology used in the Constitution, as the term "functioning" does not appear in Article 179 (paragraph 5) of the Constitution. Accordingly, the legislature is required to comply with the constitutional terminology and faithfully reproduce the constitutional provisions in order to avoid departing from their true meaning as intended by the constituent authority.

3) Directive Interpretation (L'interprétation directive)

Restrictive interpretation is considered directive when the Constitutional Court, in interpreting the provision under constitutional review, provides guidance regarding the form or substance that the provision must adopt in order to be declared constitutional. Such guidance is addressed to the authority responsible for implementing the law, which is required to comply with the constitutional requirements set forth in the interpretative reservation.³³

In certain cases, the Constitutional Court considers that the constitutional defect does not stem from the normative meaning of the legislative provision itself, but rather from the manner in which it may be applied. Consequently, the Court declares the provision constitutional subject to a condition or interpretative reservation addressed to the authorities responsible for enforcing the provision—particularly the judiciary—guiding them towards the proper interpretation or application consistent with the Constitution.³⁴

Directive interpretation therefore differs from both constructive interpretation and neutralizing interpretation in that it consists of providing guidance to the authority responsible for applying the legislative provision without addressing or modifying its substantive meaning. It thus serves as an interpretative clarification enabling the law to be implemented in a manner consistent with the Constitution.

Among the most notable examples of the Algerian Constitutional Court's use of directive interpretative reservations are the following:

A- Review of the Constitutionality of the Organic Law Determining the Conditions and Procedures for Raising a Plea of Unconstitutionality

The Constitutional Court held that Article 9 of the Organic Law determining the conditions and procedures for raising a plea of unconstitutionality,³⁵ submitted for constitutional review, establishes three conditions which must be fulfilled before the plea of unconstitutionality may be referred. The Court further considered that, by authorizing judges of the judicial bodies to determine whether the conditions for admissibility of the plea are satisfied, by referring to the Constitutional Council's jurisprudence and assessing the seriousness of the constitutional ground invoked by one of the parties to the dispute, the legislature did not intend to confer upon those judicial bodies discretionary powers equivalent to those exclusively vested in the Constitutional Council.

In its directive interpretative reservation concerning this provision, the Constitutional Court concluded that exercising a power which the constituent authority has exclusively entrusted to the Constitutional Council requires judges, when exercising their functions, to remain within the limits that merely allow them to verify whether the conditions set out in Article 9 of the Organic Law under review have been satisfied, without extending their assessment to the constitutionality of the legislative provision challenged by one of the parties to the dispute. Consequently, this interpretative reservation must be observed when applying the provisions of this article, while the article itself remains consistent with the Constitution.

B- Review of the Constitutionality of the Law Establishing the Basic Statute of Members of Parliament

When reviewing Article 28 of the Law establishing the Basic Statute of Members of Parliament submitted for constitutional review,³⁶ the Constitutional Court directed Parliament that, although it has the authority to determine the material resources necessary for members of Parliament to perform their parliamentary duties, with such resources being specified in the rules of procedure of each chamber, it is nevertheless required to ensure that these resources, including the establishment of a parliamentary office, do not contravene the provisions of Article 105 and paragraph 2 of Article 115 of the Constitution. Through this interpretative reservation, the Constitutional Court provided guidance to both chambers of Parliament to ensure that constitutional requirements are observed when determining the resources to be placed at the disposal of members of Parliament for the performance of their parliamentary functions.

Secondly: The Binding Force of the Constitutional Judge's Interpretative Reservations

The Algerian constitutional judge has adopted the mechanism of interpretative reservations and has relied upon it in numerous applications, as previously explained. This mechanism falls within the framework of the constitutional judge's contribution to legislative drafting by

correcting deficiencies and defects that are inconsistent with constitutional requirements. Nevertheless, the question arises as to the legal authority of these interpretations when the constitutional judge declares the constitutionality of a legislative provision while merely attaching an interpretative reservation thereto.

1) The Binding Force of Interpretative Reservations

The binding force of interpretative reservations has been affirmed through the authority of the opinions and decisions of the Constitutional Court. The last paragraph of Article 198 of the 2020 constitutional amendment provides that: “The decisions of the Constitutional Court shall be final and binding upon all public authorities, administrative authorities, and judicial authorities.” Accordingly, when the constitutional judge adopts an interpretative reservation, the legislature is required to observe that reservation as a condition for the constitutionality of the legislative provision. Interpretative reservations are therefore not merely advisory opinions that may be disregarded; rather, they possess a binding legal character, ensuring that the legislative text conforms to the Constitution.

Since its earliest opinions and decisions, the Algerian Constitutional Council has consistently reiterated the interpretative reservations contained in the reasoning (*motifs*) of its opinions and decisions, as well as in their operative part (*dispositif*). Moreover, the Constitutional Council found the constitutional basis for its competence to interpret the Constitution in the first paragraph of Article 163 of the 1996 Constitution. Consequently, the interpretative reservations issued by the Constitutional Council enjoy binding legal force.³⁷

Among the notable examples, the Algerian constitutional judge affirmed the absolute authority of *res judicata* with respect to interpretative reservations in its Opinion issued on 2 August 2018 concerning the review of the constitutionality of the Organic Law relating to the Algerian Academy of the Amazigh Language.³⁸ The Constitutional Council held that, when exercising its constitutional powers, if it declares a legislative provision constitutional subject to compliance with an interpretative reservation accompanying the declaration of constitutionality, such reservation itself acquires the absolute authority of *res judicata* and becomes binding upon all authorities, which must apply the provision in accordance with the interpretation adopted by the Constitutional Council.

The Constitutional Council reiterated once again the binding nature of its interpretative reservations during its review of the Organic Law determining the organization and functioning of the People’s National Assembly and the Council of the Nation, as well as the functional relations between them and the Government.³⁹ It held that, in drafting the first paragraph of Article 38 of the Organic Law under review—concerning the application of the voting procedure without debate to ordinances submitted by the President of the Republic to each chamber for approval pursuant to Article 142 of the Constitution—the legislature had overlooked the reservation contained in Opinion No. 08/OC/CC/99, dated 21 February 1999. The Council therefore emphasized that its opinions and decisions possess the authority of *res judicata* and are binding upon all public authorities, administrative authorities, and judicial authorities.

In general, legal systems confer absolute authority upon constitutional provisions and the decisions interpreting them. Constitutions or the laws governing constitutional courts generally stipulate that the judgments and decisions rendered by these courts are binding upon all

authorities and individuals. This is a logical consequence of the centralized system of constitutional review, under which a single constitutional body is entrusted with ensuring the uniform interpretation and application of the Constitution throughout the State.⁴⁰

In Egypt, when the Supreme Constitutional Court interprets a legal provision, that interpretation becomes binding upon all State authorities. It enjoys absolute legal authority and must be published in the Official Gazette within a maximum period of fifteen (15) days. The interpretation remains effective for as long as the interpreted provision remains in force. However, if the legislative authority subsequently amends or repeals that provision, the interpretation issued by the Supreme Constitutional Court naturally ceases to have effect as well.⁴¹

2)The Final Nature of Interpretative Reservations

The interpretation of legislative texts provided by the constitutional judge serves to eliminate any ambiguity surrounding those texts and to identify the defects affecting their meaning. Consequently, interpretative reservation constitutes an instrument for correcting and improving the legal system by remedying its shortcomings. Accordingly, constitutional decisions containing interpretative reservations acquire a final and binding character.

From this perspective, the opinions and decisions of the constitutional judge are not subject to any form of appeal, except in cases involving the correction of a material error. Such opinions and decisions are final and immediately enforceable.⁴² This principle was expressly affirmed by the Algerian constitutional framers, who conferred final authority upon interpretative reservations through the binding force of the opinions and decisions of the Constitutional Court. The final paragraph of Article 198 of the 2020 Constitutional Amendment provides that: "The decisions of the Constitutional Court shall be final and binding upon all public authorities, administrative authorities, and judicial authorities."

Similarly, in France, the Constitutional Council interprets the Constitution and legislative provisions in the course of reviewing the constitutionality of statutes, treaties, and the internal rules of both the National Assembly and the Senate, as well as when adjudicating electoral disputes. Regarding the authority of its decisions, Article 62 of the current French Constitution stipulates that the decisions of the Constitutional Council are final and are not subject to appeal by any means.⁴³

Conclusion:

The constitutional judge exercises constitutional review over legislative texts to ensure their conformity with the provisions of the Constitution, which constitutes the supreme law of the State. Consequently, all legislation must comply with constitutional requirements. In this capacity, the constitutional judiciary has been entrusted with the authority to interpret constitutional and legislative provisions as the guarantor of constitutional supremacy. It therefore clarifies ambiguities and identifies the defects affecting legislative texts, thereby enabling a determination of their constitutionality.

Interpretative reservations constitute one of the most significant mechanisms through which the constitutional judge contributes to legislative drafting. The Algerian constitutional judge has relied upon this technique in numerous decisions to ensure compliance with the principles of sound legislative drafting and to guide the legislature in remedying deficiencies or omissions affecting legislative texts, thereby ensuring their conformity with the Constitution in both form

and substance. This, in turn, strengthens the protection of rights and public freedoms and contributes to the proper organization of public authorities in accordance with the principles of the rule of law.

Based on the foregoing analysis, the present study has reached the following conclusions:

1-The Algerian constitutional judge has been influenced by comparative constitutional models and recognized his competence to interpret legislative provisions even in the absence of an explicit constitutional provision establishing such authority, before it was formally enshrined by the 2020 Constitutional Amendment.

2-Interpretative reservations constitute a constitutional technique that enables the constitutional judge to avoid declaring a legislative provision unconstitutional. Instead of invalidating the provision, the judge corrects its interpretation by imposing interpretative reservations, thereby allowing the provision to be declared constitutional.

3-Interpretative reservations contribute to strengthening the performance of Parliament and enhancing the quality of legislative drafting by ensuring compliance with coherent, precise, and clear legal drafting standards.

4-The Algerian constitutional judge has employed various forms of interpretative reservations in the exercise of constitutional review to remedy the defects affecting legislative provisions and their constitutional validity.

5-Constitutional interpretative reservations enjoy the authority of *res judicata* with absolute binding force and are therefore binding upon all public authorities, which are required to apply legislative provisions in accordance with the interpretation established by the constitutional judge, as reaffirmed in numerous constitutional decisions.

6-Interpretative reservations possess a final legal character and are not subject to appeal in any form, since they constitute a mechanism for correcting and preserving the coherence of the legal system.

Recommendations:

In light of the foregoing findings, the following recommendations are proposed with a view to enhancing the effectiveness of interpretative reservations as a mechanism for legislative drafting:

1-To provide explicit constitutional recognition of interpretative reservations as a legislative drafting mechanism and to confer upon them the absolute authority of *res judicata*, making them binding on all persons and authorities concerned.

2-To incorporate the various categories of interpretative reservations into the Rules of Procedure of the Constitutional Court and to define the conditions and procedures governing the constitutional judge's interpretative jurisdiction.

3-To establish clear limits governing constructive interpretative reservations, whether additive or substitutive, in view of the risk of the constitutional judge replacing the legislature by adding to or substituting the substance of legislative provisions, thereby restricting parliamentary legislative authority.

4-To grant Parliament the authority, in certain cases, to reconsider legislative provisions accompanied by interpretative reservations issued by the constitutional judge whenever it considers that such reservations depart from the legislature's original intent or the objective pursued by the legislation.

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¹ Abdelaziz Barqouq, *The Role of Constitutional Review in the Protection of Public Freedoms (A Comparative Study)*, Doctoral Dissertation, Faculty of Law, University of Algiers 1 (Benyoucef Benkhedda), 2015–2016, p. 233.

² Saïd Boulachair, *The Constitutional Council in Algeria*, Office des Publications Universitaires (OPU), Algiers, 2012, pp. 99–100.

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⁴ Ahmed Ben Ziane, *The Impact of Constitutional Review on Parliamentary Sovereignty in Algeria*, Doctoral Dissertation, Faculty of Law and Political Science, University of Mohamed Khider, Biskra, 2019–2020, pp. 296–297.

⁵ Constitutional Amendment of 2020, promulgated by Presidential Decree No. 20-442 of 30 December 2020, Official Gazette, No. 82, 2020.

⁶ Abdelaziz Barkouk, *Previously Cited Reference*, p. 235.

- ⁷ Mohamed Mounir Hassani, *The Impact of Constitutional Jurisprudence on the Role of the Algerian Parliament*, Ph.D. Dissertation, Faculty of Law and Political Science, Mohamed Khider University of Biskra, 2015/2016, pp. 226–227.
- ⁸ Fetta Nebbali, *The Role of the Constitutional Council in the Protection of Rights and Public Freedoms (An Expanded Scope with Limited Boundaries)*, Ph.D. Dissertation, Faculty of Law, Mouloud Mammeri University, Tizi Ouzou, 2009/2010, p. 329.
- ⁹ Mohamed Mounir Hassani, *Previously Cited Reference*, p. 228.
- ¹⁰ Doaa El-Sawy Youssef, *Constitutional Judiciary*, Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 2014, pp. 134–135.
- ¹¹ Article 182 of the 2016 Constitutional Amendment, promulgated by Law No. 16-01 of 6 March 2016, Official Gazette, No. 14, 2016, provides: "The Constitutional Council is an independent body entrusted with ensuring respect for the Constitution."
- ¹² The Algerian Constitutional Council recognized for itself the authority to interpret the Constitution and issued an interpretative memorandum concerning the constitutional provisions governing the first partial renewal of the appointed members of the Council of the Nation, following a referral by the President of the Republic. In justifying its interpretative competence, the Council relied upon the general constitutional provision establishing constitutional review. For further discussion, see: Faṭṭah Nabālī, *op. cit.*, p. 326.
- ¹³ See Article 139 of the 2020 Constitutional Amendment.
- ¹⁴ Abdelaziz Barqouq, *op. cit.*, p. 257.
- ¹⁵ Mohamed Monir Hassani, *op. cit.*, p. 248.
- ¹⁶ Ahmed Ben Ziane, *op. cit.*, p. 335.
- ¹⁷ Mohamed Mounir Hassani, *Previously cited work*, p. 251.
- ¹⁸ Abdelaziz Barkouk, *Previously cited work*, pp. 258–259.
- ¹⁹ Saïd Boualchaïr, *Previously cited work*, p. 103.
- ²⁰ Ahmed Ben Ziane, *Previously cited work*, p. 298.
- ²¹ Ahmed Fathi Sorour, *Constitutional Protection of Rights and Freedoms*, 2nd ed., Dar Al-Shorouk, Cairo, Egypt, 2000, p. 277.
- ²² Tarek Debbah and Madjoub Gourari, *op. cit.*, p. 806.
- ²³ See the Opinion of the Constitutional Council No. 04/O.O.L./C.C./16, dated 11 August 2016, concerning the review of the constitutionality of the Organic Law determining the organization and functioning of the National People's Assembly and the Council of the Nation, as well as the functional relations between them and the Government, Official Gazette, No. 50, 2016.
- ²⁴ See the Opinion of the Constitutional Council No. 03/O.O.L./C.C./16, dated 11 August 2016, concerning the review of the constitutionality of the Organic Law relating to the High Independent Authority for Election Monitoring, Official Gazette, No. 50, 2016.
- ²⁵ See Constitutional Council, Opinion No. 02/O.C.C./2017, issued on 25 July 2017, concerning the review of the conformity of the Rules of Procedure of the Council of the Nation with the Constitution, Official Gazette of the People's Democratic Republic of Algeria, No. 49, 2017.
- ²⁶ The substitutional interpretative approach satisfies the requirements of the principle of constitutionality through a dual objective: first, avoiding the derivation of a constitutional rule that is contrary, wholly or partially, to the Constitution from the legislative provision under review; and second, deriving an alternative rule consistent with constitutional requirements. Under this approach, the legislative provision is not considered unconstitutional after being interpreted by the Constitutional Court. For further discussion, see: Ahmed Fathi Sorour, *op. cit.*, p. 279.
- ²⁷ This interpretative method derives its name from the process of "neutralization" carried out by the Constitutional Court through excluding erroneous interpretations of ambiguous provisions that conflict with the Constitution and replacing them with constitutionally compliant formulations. In other words, constitutional defects are eliminated by providing a new wording for the defective provision. See: Mohamed Mounir Hassani, *op. cit.*, p. 234.
- ²⁸ Ahmed Ben Ziane, *op. cit.*, p. 308.
- ²⁹ Saïd Boulachair, *op. cit.*, p. 102.
- ³⁰ Fetta Nebali, *op. cit.*, p. 330.

³¹ See Constitutional Council, Decision No. 16/C.C./2021, issued on 10 March 2021, concerning the review of the constitutionality of the Ordinance containing the Organic Law on the Electoral System, Official Gazette of the People's Democratic Republic of Algeria, No. 17, 2021.

³² See Constitutional Court Decision No. 02/CC/22 of 10 May 2022 concerning the review of the constitutionality of the Organic Law amending and supplementing Organic Law No. 98-01 of 30 May 1998 relating to the jurisdiction, organization and functioning of the Council of State, Official Gazette of the People's Democratic Republic of Algeria, No. 42, 2022.

³³ Tarek Dhabah and Madjoub Gourari, *op. cit.*, p. 808.

³⁴ Abdelaziz Barkouk, *op. cit.*, p. 273.

³⁵ See Opinion No. 03/OCR/CC/18 issued by the Constitutional Council on 2 August 2018 concerning the review of the constitutionality of the Organic Law determining the conditions and procedures for raising a plea of unconstitutionality, Official Gazette of the People's Democratic Republic of Algeria, No. 54, 2018.

³⁶ See Opinion No. 12/OC/CC/01 issued by the Constitutional Council on 13 January 2001 concerning the constitutional review of the Law establishing the Basic Statute of Members of Parliament, Official Gazette of the People's Democratic Republic of Algeria, No. 09, 2001.

³⁷ Fetta Nabbali, *op. cit.*, p. 352.

³⁸ See the Opinion of the Constitutional Council No. 04/OC/CC/18, dated 2 August 2018, concerning the review of the constitutionality of the Organic Law relating to the Algerian Academy of the Amazigh Language, Official Gazette, No. 54, 2018.

³⁹ See the Opinion of the Constitutional Council No. 04/OC/CC/16, dated 11 August 2016, concerning the review of the constitutionality of the Organic Law determining the organization and functioning of the People's National Assembly and the Council of the Nation, as well as the functional relations between them and the Government.

⁴⁰ Yousri Mohamed Al-Assar, *The Authority of Constitutional Courts in the Interpretation of Laws (A Comparative Study)*, Journal of the Institute of Judiciary, Kuwait Institute for Judicial and Legal Studies, Vol. 12, No. 21, February 2019, p. 27.

⁴¹ Mohamed Anas Qasim Jaafar, *Judicial Review of the Constitutionality of Laws*, Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 1999, p. 147.

⁴² Abdelkader Cherbal, *Decisions and Opinions of the Constitutional Council in the Interpretation of the Provisions of the Algerian Constitution*, Dar Houma for Printing, Publishing and Distribution, Algeria, 2012, p. 33.

⁴³ Yousri Mohamed Al-Assar, *op. cit.*, p. 28